RECORD AND BRIEFS

16-405

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No.

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), this Court held that the Due Process Clause forbids a state court from exercising general personal jurisdiction except where the defendant is "at home." BNSF Railway Company is not at home in Montana under *Daimler*, yet the Montana Supreme Court held that BNSF is subject to general personal jurisdiction in Montana, and can be sued there by out-of-state plaintiffs for claims that have no connection at all to the state. The Montana Supreme Court explicitly "declined" to apply this Court's decision in *Daimler*, for two reasons: First, because the facts of this case involve American parties and arose in the United States, not foreign parties and an overseas injury as in *Daimler*. Second, because the plaintiffs here sued under the Federal Employers' Liability Act (FELA), which is a different federal cause of action from the ones at issue in *Daimler*. Section 56 of FELA establishes *venue* for cases filed in federal court, and it provides for concurrent *subject-matter* jurisdiction in state courts. Yet the Montana Supreme Court held that this provision authorizes state courts to exercise *personal* jurisdiction, and that the statute overrides the limitations of the Due Process Clause.

The question presented is:

Whether a state court may decline to follow this Court's decision in *Daimler AG v. Bauman*, which held that the Due Process Clause forbids a state court from exercising general personal jurisdiction over a defendant that is not at home in the forum state, in a suit against an American defendant under the Federal Employers' Liability Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel states that BNSF Railway Company's parent company is Burlington Northern Santa Fe, LLC. Burlington Northern Santa Fe, LLC's sole member is National Indemnity Company. The following publicly traded company owns 10% or more of National Indemnity Company: Berkshire Hathaway Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF APPENDICES v

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 3

STATEMENT 4

A. The Constitution Limits State Courts' Personal Jurisdiction 4

B. Factual Background 6

C. The Montana Supreme Court Holds That *Daimler* Does Not Apply To This Case 7

REASONS FOR GRANTING THE PETITION 10

I. Certiorari Is Necessary To Address The Montana Supreme Court's Refusal To Apply This Court's Decision in *Daimler* 11

A. Eleven Federal Circuits Or State Courts Of Last Resort Have Refused To Limit *Daimler* To Transnational Cases 11

B. The Montana Supreme Court Flouted This Court's Opinions 14

II. Certiorari Is Necessary To Resolve The Split Over Whether FELA Confers General Personal Jurisdiction On State Courts 16

A. The Opinion Below Deepened A Split, Now 3-2, On Personal Jurisdiction In FELA Cases 17

B. The Opinion Below Is Contrary To This Court's FELA Precedents 19

III. This Case Involves Extremely Important Due-Process Protections 23

CONCLUSION 26

TABLE OF APPENDICES

Page

APPENDIX A:

Opinion of the Supreme Court of Montana 1a

APPENDIX B:

Order of the Supreme Court of Montana accepting the appeal in *Tyrrell* 34a

APPENDIX C:

Order of the Montana trial court in *Nelson* granting BNSF's motion to dismiss for lack of personal jurisdiction 36a

APPENDIX D:

Order of the Montana trial court in *Tyrrell* certifying as final for appeal the court's order on personal jurisdiction 41a

APPENDIX E:

Order of the Montana trial court in *Tyrrell* denying BNSF's motion to dismiss for lack of personal jurisdiction 47a

APPENDIX F:

Constitutional provisions, statutes, and rules involved in this case 74a

U.S. Const. amend XIV, § 1 ..... 74a

45 U.S.C. § 51 ..... 74a

45 U.S.C. § 56 ..... 75a

Mont. R. Civ. P. 4 ..... 75a

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Tradition P'ship, Inc. v. Bullock,
132 S. Ct. 2490 (2012) (per curiam) 25, 26

Anderson v. BNSF Ry. Co.,
354 P.3d 1248 (Mont. 2015).....24

Baltimore & Ohio R.R. Co. v. Kepner,
314 U.S. 44 (1941).....8, 19, 21

Bristol-Myers Squibb Co. v. Superior Court,
___ P.3d ___, 2016 WL 4506107
(Cal. Aug. 29, 2016).....13

Brown v. Lockheed Martin Corp.,
814 F.3d 619 (2d Cir. 2016) 12

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985).....15

Catholic Diocese of Green Bay, Inc. v. John Doe 119,
349 P.3d 518 (Nev. 2015).....13

ClearOne, Inc. v. Revolabs, Inc.,
369 P.3d 1269 (Utah 2016) 13

Cox Broad. Corp. v. Cohn,
420 U.S. 469 (1975).....1

Daimler AG v. Bauman,
134 S. Ct. 746 (2014).....3, 4, 5, 11, 14, 15, 20, 25

Denver & Rio Grande W. R.R. Co. v. Terte,
284 U.S. 284 (1932) 8, 19

First Cmty. Bank, N.A. v. First Tenn. Bank, N.A.,
489 S.W.3d 369 (Tenn. 2015) 13

First Metro. Church of Houston v. Genesis Grp.,
616 F. App'x 148 (5th Cir. 2015)
(per curiam) 12

State ex rel. Ford Motor Co. v. McGraw,
788 S.E.2d 319 (W. Va. 2016) 14

Genuine Parts Co. v. Cepec,
137 A.3d 123 (Del. 2016) 13

Goodyear Dunlop Tires Operations, S.A. v. Brown,
564 U.S. 915 (2011) 1, 4, 5

Hayman v. S. Pac. Co.,
278 S.W.2d 749 (Mo. 1955) 17, 18

Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408 (1984) 4

Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982) 20

International Shoe Co. v. Washington,
326 U.S. 310 (1945) 4

Jones v. ITT Sys. Div.,
595 F. App'x 662 (8th Cir. 2015)
(per curiam) 12

Kipp v. Ski Enter. Corp. of Wis., Inc.,
783 F.3d 695 (7th Cir. 2015) 12

MacKinnon v. St. Louis S.W. Ry. Co.,
518 So. 2d 89 (Ala. 1987) 18

Magill v. Ford Motor Co.,
___ P.3d ___, 2016 WL 4820223
(Colo. Sept. 12, 2016) 12

Miles v. Ill. Cent. R.R. Co.,
315 U.S. 698 (1942) 8, 18, 19

Miss. Univ. for Women v. Hogan,
458 U.S. 718 (1982) 23

Norfolk S. Ry. Co. v. Maynard,
437 S.E.2d 277 (W. Va. 1993) 17

Pope v. Atl. Coast Line R.R. Co.,
345 U.S. 379 (1953) 8, 19, 20, 21

S. Pac. Trans. Co. v. Fox,
609 So. 2d 357 (Miss. 1992) 17

Missouri ex rel. S. Ry. Co. v. Mayfield,
340 U.S. 1 (1950) 18, 20

Second Employers' Liability Cases,
223 U.S. 1, 56 (1912) 20, 21, 22

Shaffer v. Heitner,
433 U.S. 186 (1977) 1

Sioux Pharm, Inc. v. Summit Nutritionals Int'l, Inc.,
859 N.W.2d 182 (Iowa 2015) 13

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 20

Tafflin v. Levitt,
493 U.S. 455 (1990) 22

Urie v. Thompson,
337 U.S. 163 (1949) 23

W. Tradition P'ship, Inc. v. Attorney Gen. of Mont.,
271 P.3d 1 (Mont. 2011) 25

Walden v. Fiore,
134 S. Ct. 1115 (2014) 15, 23

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 15, 16, 21

Statutes

15 U.S.C. § 3007(c) 22

22 U.S.C. § 9003(a) 22

28 U.S.C. § 1257(a) 1

29 U.S.C. § 1132(e)(1) 22

42 U.S.C. § 13981(e)(3) 22

45 U.S.C. § 51 6

45 U.S.C. § 56 ..... 2, 8, 21

Constitutional Provisions

U.S. Const. amend XIV, § 1 2

U.S. Const. art. VI, cl. 2 26

Rules

Mont. R. Civ. P. 4 ..... 2, 9

Other Authorities

The Federalist No. 82
(J. Cooke ed. 1961) (A. Hamilton) 22

PETITION FOR A WRIT OF CERTIORARI

BNSF Railway Company ("BNSF") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Montana in this case.

OPINION BELOW

The opinion of the Supreme Court of Montana (Pet. App. 1a–33a) is reported at 373 P.3d 1.

JURISDICTION

The Supreme Court of Montana entered its judgment on May 31, 2016, accompanied by an opinion deciding the federal question presented in this petition. The court filed a corrected opinion with non-substantive revisions on June 7, 2016. Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 28, 2016.

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Montana Supreme Court's "judgment is plainly final on the federal issue" of personal jurisdiction under the Due Process Clause, which "is not subject to further review in the state courts." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485 (1975). BNSF "may prevail at trial on nonfederal grounds," thereby preventing this Court's review of the federal issue, and if the Montana Supreme Court erroneously found personal jurisdiction, then "there should be no trial at all." *Ibid.* In *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977), this Court held that it has jurisdiction under Section 1257(a) to review a state court's assertion of personal jurisdiction. This Court also granted certiorari in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), which had exactly the same posture as this case: a state-court judgment affirming, before trial, the denial of a motion to dismiss for lack of personal jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of tne Constitution of the United States provides, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

The relevant portion of the Federal Employers' Liability Act, 45 U.S.C. § 56, provides:

> ...
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

The relevant portion of the Montana long-arm statute, Montana Rule of Civil Procedure 4(a), (b), provides:

> (a) Definition of Person. As used in this rule, the word "person," ... includes:
>
> ...
>
> (3) a corporation;
>
> ...
>
> (b) Jurisdiction of Persons.
>
> (1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of Montana courts ...

INTRODUCTION

The Montana Supreme Court has "decline[d]" to follow this Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Pet. App. 15a. This Court in *Daimler* held that the Constitution limits general personal jurisdiction to only those forums where the defendant is "at home," which for a corporation is the place of incorporation or principal place of business (absent exceptional facts). 134 S. Ct. at 760. Nevertheless, the Montana Supreme Court held that BNSF, a Delaware corporation with its principal place of business in Texas, is subject to general personal jurisdiction in Montana, and can be sued in Montana by out-of-state plaintiffs for claims that have no connection whatsoever to Montana.

The Montana Supreme Court offered only the most superficial rationales for refusing to apply *Daimler*: The court first held that *Daimler* is limited to its facts (transnational injuries and parties incorporated overseas), whereas this case arose in the United States and all parties are American. By attempting to limit *Daimler*'s holding in this way, the Montana Supreme Court disagreed with at least 11 federal circuit courts and other state courts of last resort.

The Montana court also refused to apply *Daimler* on the ground that the plaintiffs here pled claims under the Federal Employers' Liability Act (FELA), which was not at issue in *Daimler*. FELA is a federal statute that includes a venue provision for cases in federal court, and it provides for concurrent subject-matter jurisdiction in state courts. Yet the Montana Supreme Court held that FELA confers *personal* jurisdiction on state courts, even though the Due Process Clause would forbid it. The Montana Supreme Court joined one other state supreme court, and split

with three others, on whether FELA obviates the limitations of the Due Process Clause on state courts' exercise of personal jurisdiction.

The Montana Supreme Court's distinctions of *Daimler* are transparently wrong. This Court's holdings are not narrowly confined to their particular facts, FELA does not confer personal jurisdiction on state courts, and no statute could possibly trump the Constitution's limits on personal jurisdiction. This Court's review is necessary in order to resolve the splits, to protect the Court's precedents, and to ensure due process.

STATEMENT

A. The Constitution Limits State Courts' Personal Jurisdiction

This Court has held that the Due Process Clause of the Fourteenth Amendment "sets the outer boundary of a state tribunal's authority" to exercise personal jurisdiction over a defendant. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011). Ever since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), this Court has held that the Constitution authorizes two distinct categories of personal jurisdiction. *Goodyear*, 564 U.S. at 919. The "dominant" mode is *specific* personal jurisdiction, *Daimler*, 134 S. Ct. at 758, which allows a state court to hear a suit that "arises out of or relates to the defendant's contacts with the forum," *Goodyear*, 564 U.S. at 923–24 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)). By contrast, when the cause of action does not arise out of the defendant's contacts with the forum state, a state court may still exercise *general* personal jurisdiction, but only if the defendant's "affiliations with

the State are so 'continuous and systematic' as to render [it] essentially at home in the forum state." *Id.* at 919 (quoting *International Shoe*, 326 U.S. at 317).

Justice Ginsburg's opinion for the Court in *Daimler* explained that, since *International Shoe*, it is "specific jurisdiction [that] has become the centerpiece of modern jurisdictional theory, while general jurisdiction has played a reduced role." 134 S. Ct. at 755. In other words, cases must usually be brought where they arise. General jurisdiction exists only "as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it." *Id.* at 758 n.9. For that reason, "only a limited set of affiliations with a forum will render a defendant amenable" to general jurisdiction. *Id.* at 760.

With respect to "foreign (sister-state or foreign-country) corporations," the defendant is at home in its "place of incorporation and principal place of business." *Daimler*, 134 S. Ct. at 754, 760. Only in a case with "exceptional" facts, such as where the defendant has relocated to a "surrogate" head office in a time of war, can the defendant be at home in any other state. *Id.* at 756 n.8.

Daimler rejected, as "unacceptably grasping," the contention that a corporate defendant can be subject to general jurisdiction in every state where it "engages in a substantial, continuous, and systematic course of business." 134 S. Ct. at 761. That is because general jurisdiction "does not focus solely on the magnitude of the defendant's in-state contacts," but "instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Id.* at 762 n.20.

B. Factual Background

1. BNSF is a rail carrier incorporated in Delaware. Pet. App. 3a. Its principal place of business is Texas. *Ibid.* All of BNSF's corporate headquarters and corporate officers are located in Texas. None of BNSF's corporate officers or departments has ever been located in Montana.

BNSF operates 32,500 miles of rail lines in 28 states and 2 Canadian provinces. Pet. App. 63a. BNSF has more track miles in Texas than in any other state. The company dispatches its trains and monitors its network from its Network Operations Center in Texas. BNSF generates more revenue from Texas than from any other state. Of BNSF's 43,000 employees, the company employs more people in Texas (approximately 20% of its workforce) than in any other state.

Montana is one state in which BNSF operates. But BNSF's revenues from Montana represent only a small fraction—less than 10%—of its nationwide business. Pet. App. 63a. Barely 6% of BNSF's total track mileage is located in Montana, and less than 5% of BNSF's total workforce is located in Montana. *Ibid.*

2. Respondents are two plaintiffs from outside Montana who allege that they were injured while working for BNSF outside Montana. They nevertheless brought suits in Montana state court against BNSF under FELA, 45 U.S.C. § 51.

Respondent Robert Nelson is a resident of North Dakota who is employed by BNSF as a fuel truck driver. Pet. App. 3a. In March 2008, while working for BNSF in Washington, Mr. Nelson slipped and fell, injuring his knee. Pet. App. 36a. He does not allege that he is or was a resident of Montana, that he has

ever worked for BNSF in Montana, or that his case is in any way connected to Montana. Pet. App. 3a.

Respondent Kelli Tyrrell is personal representative for the estate of Brent T. Tyrrell, a former employee of BNSF who worked in South Dakota, Minnesota, and Iowa. Pet. App. 2a–3a. The complaint alleges that, during Mr. Tyrrell's employment, he was exposed to "various carcinogenic chemicals" that caused him to develop renal cell carcinoma and ultimately resulted in his death in 2011. Pet. App. 3a. The complaint does not allege that any exposures occurred in Montana or that Mr. Tyrrell ever worked or lived in Montana. Pet. App. 3a–4a.

3. BNSF moved to dismiss both cases, arguing that the Due Process Clause prevents the Montana state courts from exercising personal jurisdiction over BNSF in these cases. The trial court in *Tyrrell* denied BNSF's motion to dismiss, Pet. App. 47a–73a, but it granted BNSF's motion to certify its ruling as final so that BNSF could appeal, Pet. App. 41a–46a. Meanwhile, another trial court in *Nelson* granted BNSF's motion to dismiss for lack of personal jurisdiction, Pet. App. 36a–40a, and the plaintiff appealed as of right. The Montana Supreme Court then accepted BNSF's appeal in *Tyrrell*, Pet. App. 34a–35a, and consolidated the cases.

C. The Montana Supreme Court Holds That *Daimler* Does Not Apply To This Case

A divided Montana Supreme Court held that it does not violate due process to subject BNSF to general personal jurisdiction in Montana state courts, and the court authorized out-of-state plaintiffs to sue BNSF in Montana on claims arising anywhere in BNSF's nationwide system. Pet. App. 5a–19a. The

Montana Supreme Court majority "decline[d]" to apply *Daimler*, a case it called "factually and legally distinguishable." Pet. App. 15a.

The Montana Supreme Court first held that this Court's constitutional ruling in *Daimler* was narrowly limited to cases with similar facts—*i.e.*, cases "brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States." Pet. App. 11a (quoting *Daimler*, 134 S. Ct. at 750). The Montana Supreme Court suggested that *Daimler* is inapplicable to cases like these, where the alleged injury occurred in the United States and "all parties involved are citizens of the United States." *Ibid.*

The Montana Supreme Court further distinguished *Daimler* because that case "did not involve a FELA claim or a railroad defendant." Pet. App. 11a. The Montana court seized on 45 U.S.C. § 56, *see* Pet. App. 6a, which establishes venue for FELA cases filed "in a district court of the United States," and provides for "concurrent" *subject-matter* jurisdiction over FELA claims in state courts. Nevertheless, the Montana court held, citing cases that did not even mention *personal* jurisdiction, that *this Court* "consistently has interpreted [Section] 56 to allow state courts to hear cases brought under the FELA even where the only basis for jurisdiction is the railroad doing business in the forum state." Pet. App. 8a (citing *Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379 (1953), and *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698 (1942)); *see also* Pet. App. 6a–7a (citing *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44 (1941)); Pet. App. 12a–13a (citing *Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284 (1932)). And *Daimler*, the Montana court said,

"did not overrule decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is 'doing business.'" Pet. App. 12a.

In a separate portion of the opinion, the Montana Supreme Court held that BNSF is subject to general personal jurisdiction in Montana under state law, because BNSF is "found within" Montana. Pet. App. 15a–19a (quoting Mont. R. Civ. P. 4(b)(1)). The Montana Supreme Court stated that this exercise of personal jurisdiction "comports with the due process clause," based on its prior conclusions distinguishing *Daimler*. Pet App. 17a–18a.

Justice McKinnon dissented. Pet. App. 20a–33a. She criticized the majority for "[d]isregarding the United States Supreme Court's express holdings in *Goodyear* and in *Daimler*," Pet. App. 20a, and would have held that there is "no sound basis to afford BNSF less constitutional protection than the defendants were afforded in *Goodyear* and *Daimler*," Pet. App. 26a. Justice McKinnon observed that the FELA precedents from this Court that were cited by the majority "hav[e] nothing to do with general jurisdiction under the Due Process Clause," that those cases "do not so much as mention the Due Process Clause or general jurisdiction," and they have never been cited by this Court "for any proposition remotely related to general jurisdiction." Pet. App. 27a–28a.

Justice McKinnon argued further that the majority's interpretation of FELA is deeply flawed because this Court has held that "Section 56 is a venue statute for the *federal courts*, not a grant of personal jurisdiction to state courts." Pet. App. 29a (emphasis added).

Moreover, "[t]he phrase 'concurrent jurisdiction' is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction." Pet App. 30a. And in any event, "Congress lacks authority to confer personal jurisdiction to state courts where the Due Process Clause of the Fourteenth Amendment would prohibit it." Pet. App. 31a.

REASONS FOR GRANTING THE PETITION

The Montana Supreme Court has explicitly refused to follow this Court's precedents. The decision below is a transparent attempt to circumvent this Court's due-process rulings and restore the "doing business" test for personal jurisdiction that was rejected in *Goodyear* and *Daimler*. In purporting to distinguish *Daimler*, the Montana Supreme Court not only disregarded this Court's authority, it also opened or deepened multiple splits with federal courts of appeals and other state courts of last resort.

If the decision below is allowed to stand, it will systematically deny due process to out-of-state defendants in Montana's courts without any prospect of further remedy. This petition is not about error correction: BNSF alone currently faces no fewer than 32 lawsuits in Montana state courts brought by FELA plaintiffs whose claims have no connection to Montana, all of which should be dismissed for lack of personal jurisdiction under *Daimler*. In multiple other states, FELA plaintiffs continue to invoke the reasoning below and ask state trial courts to expand their own personal jurisdiction beyond the limits of the Due Process Clause. BNSF and other out-of-state defendants are certain to face hundreds more improper lawsuits in Montana unless this Court grants certiorari.

I. Certiorari Is Necessary To Address The Montana Supreme Court's Refusal To Apply This Court's Decision in *Daimler*

Under *Daimler*, BNSF clearly is not "at home" in Montana. BNSF undisputedly is not incorporated or headquartered in Montana. And while BNSF does business in Montana, its contacts there represent only a small fraction of its nationwide operations, Pet. App. 63a, just as the defendant in *Daimler* did only a small fraction of its worldwide business in the forum state of California, *see* 134 S. Ct. at 752.

The Montana Supreme Court did not even attempt to perform the comparative "at home" analysis that *Daimler* held is required by the Due Process Clause. *See* 134 S. Ct. at 762 n.20. Instead the Montana Supreme Court simply said that *Daimler* does not apply at all, in part because this case does not involve foreign parties and an overseas injury. Pet. App. 11a, 15a. The court thus held it sufficient for general personal jurisdiction that BNSF is "doing business," to any degree, in Montana. But *Daimler*, by its own terms, applies with equal force to cases with American parties and injuries that occurred in the United States. The Montana Supreme Court's attempt to confine *Daimler* to its facts is contrary to every other appellate court that has addressed the issue.

A. Eleven Federal Circuits Or State Courts Of Last Resort Have Refused To Limit *Daimler* To Transnational Cases

The Montana Supreme Court's decision created an 11-1 split on whether the "at home" rule for general personal jurisdiction applies in purely domestic cases.

The Second Circuit has expressly rejected the argument that *Daimler* "addressed personal jurisdiction

in an international context that is not present in this case." *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629–30 (2d Cir. 2016). Instead, the Second Circuit noted that *Daimler* "did not limit its jurisdictional ruling" to transnational cases, and that *Daimler* "made explicit reference to 'sister-state' corporations and drew no distinction in its reasoning between those and foreign-country corporations." *Id.* at 630. The Second Circuit thus concluded that there is "no sound basis for restricting *Daimler*'s (or *Goodyear*'s) teachings to suits brought by international plaintiffs against international defendants." *Ibid.*

Similarly, the Colorado Supreme Court has explicitly rejected an attempt to distinguish *Daimler* on the ground that it "involved international disputes with foreign plaintiffs." *Magill v. Ford Motor Co.*, ___ P.3d ___, 2016 WL 4820223, at ¶ 19 (Colo. Sept. 12, 2016). "*Daimler*," the Colorado Supreme Court said, "cannot be disposed of so easily." *Ibid.* "Whether a nonresident corporate defendant is a resident of another country or another state is irrelevant to the general jurisdiction inquiry." *Ibid.*

Three other federal circuit courts have implicitly rejected the Montana Supreme Court's reasoning by applying *Daimler* in full to purely domestic corporations and events. *See Kipp v. Ski Enter. Corp. of Wis., Inc.*, 783 F.3d 695, 698 (7th Cir. 2015) (applying *Daimler* to reject general personal jurisdiction in Illinois over a Wisconsin corporation); *First Metro. Church of Houston v. Genesis Grp.*, 616 F. App'x 148, 149 (5th Cir. 2015) (per curiam) (applying *Daimler* to dismiss a suit against a Pennsylvania corporation); *Jones v. ITT Sys. Div.*, 595 F. App'x 662 (8th Cir. 2015) (per curiam) (applying *Daimler* to dismiss a suit against a

defendant that, as described by the district court, was a Delaware corporation with its principal place of business in Colorado).

At least six state courts of last resort have applied *Daimler* in full to cases involving domestic parties and events. *See Bristol-Myers Squibb Co. v. Superior Court*, ___ P.3d ___, 2016 WL 4506107, at *7–8 (Cal. Aug. 29, 2016) (applying *Daimler* to reject general personal jurisdiction in California over a Delaware corporation headquartered in New York); *ClearOne, Inc. v. Revolabs, Inc.*, 369 P.3d 1269, 1282–83 (Utah 2016) (applying *Daimler* to reject general personal jurisdiction in Utah over a Delaware corporation); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 127–28 (Del. 2016) (applying *Daimler* to a Georgia corporation); *Catholic Diocese of Green Bay, Inc. v. John Doe 119*, 349 P.3d 518, 519–20 (Nev. 2015) (holding that a Wisconsin-based Catholic diocese was not subject to general personal jurisdiction in Nevada under *Daimler*); *First Cmty. Bank, N.A. v. First Tenn. Bank, N.A.*, 489 S.W.3d 369, 386–87 (Tenn. 2015) (holding that ratings agencies based in New York and Delaware were not subject to general personal jurisdiction in Tennessee because they are not "at home" there under *Daimler*), *cert. denied*, 136 S. Ct. 2511 (2016); *Sioux Pharm, Inc. v. Summit Nutritionals Int'l, Inc.*, 859 N.W.2d 182, 194–95 (Iowa 2015) (rejecting general personal jurisdiction in Iowa over a New Jersey corporation based on *Daimler*).

Certiorari is necessary in order to eliminate any potential confusion over the applicability of *Daimler* to purely domestic cases. Although the Montana Supreme Court currently stands alone, the Supreme Court of Appeals of West Virginia recently expressed

doubt about whether *Daimler* applies to domestic corporations. *See State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319 (W. Va. 2016). The West Virginia court ultimately did not determine the matter, *see id.* at 333, but the court stated that *Daimler* "involved an unusual fact setting with no connection whatsoever to the United States," *id.* at 329, and it found this "transnational context" to be "significant," *id.* at 333. The West Virginia court thought that the facts of *McGraw*, which all occurred in the United States, created a "setting [that] is unlike those confronted by the United States Supreme Court in *Daimler*, *Helicopteros*, or *Goodyear*," which involved "international considerations." *Ibid.*

B. The Montana Supreme Court Flouted This Court's Opinions

This Court should also grant certiorari because the Montana Supreme Court's attempt to limit this Court's precedents is wrong. Justice Ginsburg's opinions for the Court in both *Goodyear* and *Daimler* were explicit that, in the law of personal jurisdiction, a "foreign" corporation refers to a corporation based *either* in a "sister state" or a "foreign country." *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 919) (hyphenation omitted).

Moreover, as this Court has explained, it is *specific* jurisdiction (not general jurisdiction) that takes account of the place where the events in the suit occurred, in order to determine whether the suit arises in the forum. *Daimler*, 134 S. Ct. at 754–55. General jurisdiction, on the other hand, focuses solely on the relationship between the defendant and the forum state, *ibid.*, a relationship to which the Montana Supreme Court paid no serious attention.

Although this Court went on in *Daimler* to discuss the "transnational context" of that case and the "risks to international comity" from an expansive view of personal jurisdiction, 134 S. Ct. at 762–63, the Court addressed those issues in a separate portion of the opinion from the portion that discussed fundamental principles of due process that apply in every case, *id.* at 760–61. As Justice Sotomayor's separate opinion recognized, *Daimler* confirmed that the "at-home" principle "would apply equally to preclude general jurisdiction over a U.S. company that is incorporated and has its principal place of business in another U.S. State." *Id.* at 773 n.12 (Sotomayor, J., concurring in judgment).

More fundamentally, the Montana Supreme Court's suggestion that transnational facts deserve a different personal-jurisdiction analysis cannot be squared with *International Shoe*—the foundation for *Daimler* and all of modern personal-jurisdiction law—which involved purely domestic parties and events. This Court has applied *International Shoe* in exactly the same way in both transnational cases and when all of the parties and events are American. *See, e.g.*, *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

The Montana Supreme Court also disregarded the *reasoning* that underlies this Court's holdings. The due-process limitations on personal jurisdiction protect individual liberty by guarding against "the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen*, 444 U.S. at 292. The Due Process Clause also "ensure[s] that the States,

through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Ibid.* Both of those concerns apply just as much to domestic cases as to transnational ones, and both apply in full to this case.

Certiorari is necessary to resolve the split and to reinforce that this Court in *Goodyear* and *Daimler* meant what it said: Corporations based in sister-states are not subject to general personal jurisdiction except where they are "at home."

II. Certiorari Is Necessary To Resolve The Split Over Whether FELA Confers General Personal Jurisdiction On State Courts

If the Montana Supreme Court had done nothing more than limit *Daimler* to its facts, then a summary reversal would be the obvious solution. But the Montana Supreme Court also justified its refusal to apply *Daimler*'s due-process standard—and its revival of a "doing business" test for general personal jurisdiction—on the additional ground that *Daimler* "did not involve a FELA claim or a railroad defendant." Pet. App. 11a. In doing so, the Montana Supreme Court exacerbated a split of authority—now 3-2 with Montana in the minority—regarding whether FELA obviates the limitations of the Due Process Clause on state courts' exercise of general personal jurisdiction.

The Montana Supreme Court's holding was clear legal error. Even if the Montana court's statutory analysis were correct—and it is not—*Daimler* is a constitutional holding interpreting the Fourteenth Amendment, which cannot be overridden by a statute. Certiorari is necessary to resolve the split and reaffirm that the Constitution is the supreme law of the land.

A. The Opinion Below Deepened A Split, Now 3-2, On Personal Jurisdiction In FELA Cases

In *Southern Pacific Transportation Co. v. Fox*, 609 So. 2d 357, 362–63 (Miss. 1992), the Supreme Court of Mississippi explicitly rejected the conclusion that FELA provides a basis for personal jurisdiction in state court wherever the railroad does business, without the need for a due-process analysis. The Mississippi court held that, although "FELA provides a regime of concurrent federal and state jurisdiction ... this refers to *subject matter* jurisdiction." *Id.* at 362–63 (emphasis added). The Mississippi court further held, contrary to the Montana court here, that "[n]othing in the act addresses the matter of personal jurisdiction in the state court." *Ibid.* The court ordered the FELA case dismissed for lack of personal jurisdiction. *Ibid.*

Similarly, in *Norfolk Southern Railway Co. v. Maynard*, 437 S.E.2d 277, 280–81 (W. Va. 1993), the Supreme Court of Appeals of West Virginia held that, in a FELA case, a state court must first ensure that it has personal jurisdiction over the defendant by applying the due-process standard of *International Shoe*, before turning to FELA. The West Virginia court explained that, "*[i]n addition* to the requirements for *in personam* jurisdiction outlined in *International Shoe* and its progeny," Section 56 imposes *further* limitations on where a FELA action may be brought. *Id.* at 281 (first emphasis added). The court remanded for further factual development on personal jurisdiction. *Id.* at 284.

And in *Hayman v. Southern Pacific Co.*, 278 S.W.2d 749, 751 (Mo. 1955), the Supreme Court of

Missouri rejected the contention that personal jurisdiction could be based on FELA. Contrary to the Montana court here, the Missouri court held that, in any FELA action, the state court "must acquire jurisdiction over the defendant." *Ibid.* (citing *Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1, 3 (1950)). The Missouri court thus applied *International Shoe* and concluded that, even though the defendant was doing business in Missouri, personal jurisdiction was inconsistent with due process. *Id.* at 751–52.

On the other side of the split, the Supreme Court of Alabama has agreed with the Montana Supreme Court that, in a FELA case, it is sufficient for personal jurisdiction that the defendant is doing business in the forum state. *See MacKinnon v. St. Louis S.W. Ry. Co.*, 518 So. 2d 89, 93 (Ala. 1987). The Alabama Supreme Court, like the Montana Supreme Court, misread this Court's decision in *Miles v. Illinois Central Railroad*, 315 U.S. 698 (1942), as a case about personal jurisdiction. 518 So. 2d at 93. In fact, as discussed below, *Miles* has nothing to do with personal jurisdiction.

Certiorari is necessary to resolve this 3-2 split on whether the Due Process Clause, as interpreted by *International Shoe* and *Daimler*, controls in FELA cases filed in state court, or instead whether it is sufficient for personal jurisdiction that the defendant is doing business in the forum. This issue is a matter of live controversy throughout the United States: FELA plaintiffs have invoked the reasoning below in several other state trial courts in an attempt to have those courts assert general personal jurisdiction over railroads wherever they operate.

B. The Opinion Below Is Contrary To This Court's FELA Precedents

The Montana Supreme Court grossly misconstrued this Court's FELA precedents, *see* Pet. App. 6a–9a, 12a–13a, which have never approved personal jurisdiction in every state court where a railroad is doing business. As Justice McKinnon pointed out below, not one of the cases cited by the Montana majority so much as *mentioned* personal jurisdiction. Pet. App. 27a–28a.

In *Denver & Rio Grande Western Railroad Co. v. Terte*, 284 U.S. 284, 285 (1932), the defendants contended that a FELA lawsuit against them in the forum would burden interstate commerce in violation of the Dormant Commerce Clause; they did not object to personal jurisdiction based on the Due Process Clause. This Court sustained the dormant-commerce-clause challenge as to one railroad and rejected it as to another, *id.* at 286–87, but the Court said nothing about personal jurisdiction or due process.

In both *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U.S. 44, 47 (1941), and *Miles*, 315 U.S. at 699, this Court considered whether FELA preempted the traditional equitable power of a state court to enjoin lawsuits in neighboring courts on the ground that they are vexatious and harassing. This Court held that Congress had indeed preempted state courts from enjoining FELA cases in both federal court, *Kepner*, 314 U.S. at 53–54, and other state courts, *Miles*, 315 U.S. at 704. But neither opinion discussed personal jurisdiction, much less held that FELA confers general personal jurisdiction on every state court where a railroad operates. Similarly, *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379, 381 (1953), raised exactly the same question presented as *Miles* based on a later

statutory amendment, and this Court held that the amendment did not change Congress's prohibition on equitable injunctions in FELA cases, *id.* at 387. *Pope* too was not about personal jurisdiction.

The fact that some state courts in these cases apparently exercised jurisdiction over out-of-state defendants does not support the Montana Supreme Court's judgment, because the defendants in these cases may have waived personal jurisdiction. *See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (personal jurisdiction is a waivable right); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (holding that "drive-by jurisdictional rulings of this sort ... have no precedential effect").

In any event, even if this Court's earlier precedents had tacitly authorized state courts' general personal jurisdiction in FELA cases wherever the railroad is doing business—and they did not—those cases still would not justify the result here. All but *Pope* were decided in the "era" before *International Shoe*, when it sufficed for general personal jurisdiction that the defendant had continuous operations in the forum state. *See Daimler*, 134 S. Ct. at 761 n.18. This Court made clear in *Daimler* that cases from that era "should not attract heavy reliance today." *Ibid.*

In fact, however, this Court's precedents actually *refute* the Montana Supreme Court's holding that FELA confers personal jurisdiction on state courts. This Court has held that FELA is not an "attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure." *Second Employers' Liability Cases*, 223 U.S. 1, 56 (1912). In *Missouri ex rel. Southern Railway Co. v. Mayfield*, 340 U.S. 1, 3 (1950), this Court treated it

as a given that a FELA case may be brought only where "the State has acquired jurisdiction over the defendant."

The Montana Supreme Court relied on FELA's Section 56. Pet. App. 6a. That provision states that "[u]nder this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56. But that sentence plainly "establishes venue for an action in the federal courts." *Kepner*, 314 U.S. at 52; *see also Pope*, 345 U.S. at 385 (Section 56 provides a "right to establish venue in the federal court"). It has nothing to do with state courts' personal jurisdiction, which is limited by the Fourteenth Amendment as a means of protecting individual liberty and policing the states' "status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292.

The next sentence of Section 56 provides that "[t]he jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." 45 U.S.C. § 56. The Montana Supreme Court stated that Section 56 "does not specify whether the 'concurrent jurisdiction' conferred upon the state and federal courts refers only to subject-matter jurisdiction or personal jurisdiction, [and] the U.S. Supreme Court has never given it such an interpretation." Pet. App. 14a. That is plainly wrong. As this Court explained in the *Second Employers' Liability Cases*, Section 56 was drafted to correct the mistaken impression of some state courts that Congress had meant to withdraw *subject-matter* jurisdiction over FELA claims from state courts. 223 U.S.

at 55. Section 56's confirmation of "concurrent" jurisdiction in state courts simply rebuts any argument that "the enforcement of the rights which [FELA] creates was originally intended to be restricted to the Federal courts." *Id.* at 56. That is solely a matter of subject-matter jurisdiction, not personal jurisdiction. Section 56 thus reaffirms that the Constitution grants subject-matter jurisdiction over FELA claims to state courts, but only "when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Id.* at 55.

Indeed, the term "concurrent jurisdiction" *always* refers to the "authority" of a state court "to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *see also* The Federalist No. 82, p. 555 (J. Cooke ed. 1961) (A. Hamilton) (the Constitution establishes that "the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited"). There are many, many federal statutes that confer "concurrent jurisdiction" on state courts, and those have always been understood to confer subject-matter jurisdiction, never personal jurisdiction. *See, e.g.*, 15 U.S.C. § 3007(c) (Interstate Horseracing Act); 22 U.S.C. § 9003(a) (International Child Abduction Remedies Act); 29 U.S.C. § 1132(e)(1) (ERISA); 42 U.S.C. § 13981(e)(3) (Violence Against Women Act). This Court has never suggested that Congress even has the *power* to affect the personal jurisdiction of state courts.

The Montana Supreme Court simply ignored the fundamental difference between state courts' subject-matter jurisdiction, which can be altered by Congress, and personal jurisdiction, which is governed by state law subject to the Due Process Clause.

Even if the Montana Supreme Court's interpretation of FELA were correct—and it is not, not even close—the Montana Supreme Court refused to respect *Daimler*'s status as a *constitutional* holding. This Court has made clear that it is "[t]he Due Process Clause" that restricts the states' personal jurisdiction, in order to "protect the liberty of the nonresident defendant." *Walden*, 134 S. Ct. at 1121–22. The Montana Supreme Court desired to give FELA a "liberal construction" in favor of injured railroad workers. Pet. App. 5a (citing, *e.g.*, *Urie v. Thompson*, 337 U.S. 163, 180 (1949)); *see also* Pet. App. 14a, 18a. But the construction of FELA makes no difference to the Due Process Clause. "[N]either Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732–33 (1982).

Certiorari is necessary to resolve the split and to clarify that this Court's constitutional holdings cannot be abrogated by statute.

III. This Case Involves Extremely Important Due-Process Protections

This Court's intervention is also necessary to prevent a systematic deprivation of due process in Montana's courts.

If the Montana Supreme Court's decision is allowed to stand, then every domestic company that does any business in Montana (particularly railroads) will potentially be subject to general personal jurisdiction in Montana. Montana trial courts will cite the opinion below and deny motions to dismiss for lack of personal jurisdiction on the ground that *Daimler* is limited to cases with foreign plaintiffs, foreign defendants, and events occurring outside the United States. Moreover, the Montana Supreme Court's exclusion of

FELA cases from the protections of due process will provide a blueprint for courts to exclude other statutory causes of action.

It is also a certainty that, under the decision below, every railroad operating in Montana will be subject to suit in Montana for FELA claims arising across the nation with no connection to the state. BNSF and other railroads will thus be forced to defend cases in Montana when, as here, the site of the injury, the relevant evidence, and the witnesses are all located hundreds of miles away.

To make matters worse, the Montana Supreme Court has repeatedly subjected railroad defendants to plaintiff-friendly procedural rules and substantive FELA standards. For example, the Montana Supreme Court has explicitly disagreed with the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Circuits and extended the statute of limitations for FELA claims longer than any other court. *See Anderson v. BNSF Ry. Co.*, 354 P.3d 1248, 1259–61 (Mont. 2015), *cert. denied*, 136 S. Ct. 1495 (2016). In combination with *Anderson*, the decision below means that BNSF will not only face out-of-state lawsuits in Montana that should have been tried elsewhere; BNSF will face untimely lawsuits in Montana that should never have been tried at all.

The predictable result of the decision below is rampant forum shopping, an abuse that is already occurring in Montana with alarming frequency. There are currently 32 cases against BNSF pending in Montana state courts brought by FELA plaintiffs who are not Montana residents, who were not injured in Montana, and who do not allege *any* Montana-related acts

or omissions.* And BNSF and other railroads have also been sued in many other states where they are not at home by out-of-state FELA plaintiffs armed with the reasoning below. Unless this Court intervenes, BNSF and other defendants will face hundreds more out-of-state FELA lawsuits, and suffer precisely the "exorbitant exercises of all-purpose jurisdiction" that *Daimler* sought to prohibit. 134 S. Ct. at 761.

* * *

This is not the first time the Montana Supreme Court has defiantly refused to apply a constitutional decision of this Court that it did not like. *See W. Tradition P'ship, Inc. v. Attorney Gen. of Mont.*, 271 P.3d 1 (Mont. 2011). Last time around, this Court summarily reversed. *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam).

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* *Kingery v. BNSF Ry. Co.*, No. DV 11-1799; *Hoemberg v. BNSF Ry. Co.*, No. DV 12-86; *Cole v. BNSF Ry. Co.*, No. DV 12-88; *Brunelle v. BNSF Ry. Co.*, No. DV 12-862; *Veal v. BNSF Ry. Co.*, No. DV 13-179; *Hagel v. BNSF Ry. Co.*, No. DV 13-180; *Smith v. BNSF Ry. Co.*, No. DV 13-292; *Lopez v. BNSF Ry. Co.*, No. DV 13-332; *Klein v. BNSF Ry. Co.*, No. DV 13-401; *Collins v. BNSF Ry. Co.*, No. DV 13-427; *Ward v. BNSF Ry. Co.*, DV 13-570; *Heim v. BNSF Ry. Co.*, No. DV 13-591; *DeLeon v. BNSF Ry. Co.*, No. DV 13-729; *Vontz v. BNSF Ry. Co.*, No. DV 13-798; *Monroy v. BNSF Ry. Co.*, No. DV 13-799; *Ward v. BNSF Ry. Co.*, No. DV 13-1028; *Linder v. BNSF Ry. Co.*, No. DV 13-1069; *Stevens v. BNSF Ry. Co.*, No. DV 13-1274; *Pfaffle v. BNSF Ry. Co.*, No. DV 13-1388; *Abeyta v. BNSF Ry. Co.*, No. DV 13-1626; *Beck v. BNSF Ry. Co.*, No. DV 14-167; *Cox v. BNSF Ry. Co.*, No. DV 14-360; *Hoskins v. BNSF Ry. Co.*, No. DV 14-361; *Molder v. BNSF Ry. Co.*, No. DV 14-568; *McNutt v. BNSF Ry. Co.*, No. 14-1089; *Rohr v. BNSF Ry. Co.*, No. DV 14-1219; *Humphries v. BNSF Ry. Co.*, No. DV 14-1345; *Shute v. BNSF Ry. Co.*, No. DV 15-280; *Truelove v. BNSF Ry. Co.*, No. 15-281; *Gobin v. BNSF Ry. Co.*, No. ADV 15-723; *Puuri v. BNSF Ry. Co.*, No. DV 16-565; *Mitchell v. BNSF Ry. Co.*, No. DV 16-1161.

Although summary reversal would be appropriate here, the Court may prefer to grant certiorari in order to resolve the FELA-related split and to clarify that a statute may not override the Due Process Clause.

General personal jurisdiction is not a novel or difficult issue; the opinion in *Goodyear* was unanimous, and eight Justices joined the Court's opinion in *Daimler*. The judgment below depends on the Montana Supreme Court's astounding contention that *Daimler*'s constitutional rule does not apply to domestic railroads doing business in Montana. But "[t]here can be no serious doubt that it does." *American Tradition*, 132 S. Ct. at 2491 (citing U.S. Const. art. VI, cl. 2). The Montana Supreme Court must not be allowed to ignore this Court's decisions and deny due process to out-of-state defendants in Montana's courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 28, 2016

APPENDIX

APPENDIX A

DA 14-0825

IN THE SUPREME COURT
OF THE STATE OF MONTANA

2016 MT 126

KELLI TYRRELL, as Special Administrator
for the Estate of BRENT T. TYRRELL (deceased),
Plaintiff and Appellee,

v.

BNSF RAILWAY CO., a Delaware corporation,
Defendant and Appellant.

ROBERT M. NELSON,

Plaintiff and Appellant,

v.

BNSF RAILWAY CO.,
a Delaware corporation,

Defendant and Appellee.

APPEAL FROM: District Court of the Thirteenth Judicial District, In and For the County of Yellowstone, Cause Nos. DV 14-0699 and DV 11-417
Honorable Michael G. Moses and
G. Todd Baugh, Presiding Judges

* * *

Argued and Submitted: December 9, 2015
Decided: May 31, 2016

Filed: s/
Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 The plaintiffs in these consolidated appeals, Robert Nelson and Kelli Tyrrell (Tyrrell), as Special Administrator of the Estate of Brent Tyrrell (Brent), pled violations of the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 through 60, for injuries allegedly sustained while Nelson and Brent were employed by BNSF Railway Company in states other than Montana. Both actions were brought in the Thirteenth Judicial District Court, Yellowstone County. BNSF moved to dismiss both plaintiffs' claims for lack of personal jurisdiction. Judge Michael G. Moses, presiding over Tyrrell's action, denied BNSF's motion to dismiss. Judge G. Todd Baugh, presiding over Nelson's action, granted BNSF's motion to dismiss. BNSF appeals Judge Moses' order, and Nelson appeals Judge Baugh's order. The issues on appeal are:

1. *Whether Montana courts have personal jurisdiction over BNSF under the FELA.*

2. *Whether Montana courts have personal jurisdiction over BNSF under Montana law.*

¶2 We hold that Montana courts have general personal jurisdiction over BNSF under the FELA and Montana law. We affirm Judge Moses' order denying BNSF's motion to dismiss Tyrrell's complaint. We reverse Judge Baugh's order granting BNSF's motion to

dismiss Nelson's complaint. We remand both cases for further proceedings consistent with this Opinion.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 In March 2011, Nelson, a North Dakota resident, sued BNSF to recover damages for knee injuries he allegedly sustained while employed by BNSF as a fuel truck driver. BNSF is a Delaware corporation, and its principal place of business is Texas. Nelson's complaint did not allege that Nelson ever worked in Montana or was injured in Montana.

¶4 BNSF filed a M. R. Civ. P. 12(b)(2) motion to dismiss Nelson's complaint for lack of personal jurisdiction. Judge Baugh granted BNSF's motion, stating: "I believe 3 Judges in this District have faced similar Motions which they have denied based on applicable precedent. Their rulings seem sound but do not look at whether based on common sense it may be time to reassess FELA cases in Montana which have no forum related connection." Judge Baugh then relied upon a recent United States Supreme Court decision, *Daimler AG v. Bauman*, ___ U.S. ___, 134 S. Ct. 746 (2014) (discussed in our resolution of Issue 1), to hold that BNSF's "due process rights prevent this Court from exercising general all-purpose jurisdiction over [BNSF] and this Court does not have specific jurisdiction." Nelson appeals Judge Baugh's order granting BNSF's motion to dismiss.

¶5 In May 2014, Tyrrell sued BNSF for injuries Brent allegedly sustained during the course of his employment with BNSF. The complaint alleged that, while working for BNSF, Brent was exposed to various carcinogenic chemicals that caused him to develop kidney cancer and ultimately led to his death. The

complaint did not allege that Brent ever worked for BNSF in Montana or that any of the alleged chemical exposures occurred in Montana.

¶6 BNSF filed a M. R. Civ. P. 12(b)(2) motion to dismiss Tyrrell's complaint for lack of personal jurisdiction. Judge Moses denied BNSF's motion. He adopted and incorporated Montana Thirteenth Judicial District Court, Yellowstone County Judge Gregory R. Todd's ruling on BNSF's M. R. Civ. P. 12(b)(2) motion to dismiss in *Jesse R. Monroy v. BNSF Ry. Co.*, Cause No. DV 13-799 (Aug. 1, 2014). In *Monroy*, Judge Todd found:

> BNSF has established 40 new facilities in Montana since 2010 and invested $470 million dollars in Montana in the last four years. . . . In 2010, Montana shipped by BNSF 35.2 million tons of coal, 8.5 million tons of grain and 2.9 million tons of petroleum. . . . In the last year approximately 57,000 BNSF rail cars of grain per year rode the rails in Montana and 230,000 BNSF rail cars of coal per year go out of Montana. In October 2013, BNSF opened an economic development office in Billings, Montana, because of the heightened amount of business not only for coal and grain in Montana, but in particular the Bakken oil development.[1]

Judge Todd analyzed Montana and United States Supreme Court precedent interpreting the FELA. He concluded that, under Montana's long-arm statute, M. R. Civ. P. 4(b)(1), BNSF "does meet the criteria of

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[1] BNSF has not disputed any of these facts.

being found within Montana and having substantial, continuous and systematic activities within Montana for general jurisdiction purposes." BNSF appeals Judge Moses' order denying BNSF's motion to dismiss, which adopted and incorporated Judge Todd's analysis in *Monroy*.

STANDARD OF REVIEW

¶7 "The existence of personal jurisdiction is a question of law, which we review de novo." *Tackett v. Duncan*, 2014 MT 253, ¶ 16, 376 Mont. 348, 334 P.3d 920.

DISCUSSION

¶8 *1. Whether Montana courts have personal jurisdiction over BNSF under the FELA.*

¶9 Congress enacted the FELA in 1908. The Act was "an avowed departure from the rules of common law," in response to "the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Mo. Pac. R.R. Co.*, 356 U.S. 326, 329, 78 S. Ct. 758, 762 (1958). In keeping with Congressional intent, "[t]he United States Supreme Court has repeatedly noted that the FELA is to be given a liberal construction in favor of injured railroad employees so that it may accomplish humanitarian and remedial purposes." *Labella v. Burlington N.*, 182 Mont. 202, 205, 595 P.2d 1184, 1186 (1979) (citing *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018 (1949); *Coray v. S. Pac. Co.*, 335 U.S. 520, 69 S. Ct. 275 (1949); *McGovern v. Phila. & Reading R.R.*, 235 U.S. 389, 35 S. Ct. 127 (1914)).

¶10 When the FELA was initially enacted, "venue of actions under it was left to the general venue statute, 35 Stat. 65, which fixed the venue of suits in the United States courts, based in whole or in part upon the [FELA], in districts of which the defendant was an inhabitant." *Balt. & Ohio. R.R. Co. v. Kepner*, 314 U.S. 44, 49, 62 S. Ct. 6, 8 (1941) (citation omitted). However, "[l]itigation promptly disclosed what Congress considered deficiencies in such a limitation of the right of railroad employees to bring personal injury actions." *Kepner*, 314 U.S. at 49, 62 S. Ct. at 8 (citations omitted). Thus, in 1910, Congress added the following language to Section 6 of the FELA, 45 U.S.C. § 56:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

See Kepner, 314 U.S. at 49, 62 S. Ct. at 8 (citing Act of Apr. 5, 1910, Pub. L. No. 61-117, ch. 143, 36 Stat. 291).

¶11 This language was added to rectify "the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier, with consequent increased expense for the transportation and maintenance of witnesses, lawyers and parties, away from their homes." *Kepner*, 314 U.S. at 50, 62 S. Ct. at 8. The amendment was

"deliberately chosen to enable the plaintiff, in the words of Senator Borah, who submitted the report on the bill [to amend the FELA], 'to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so.'" *Kepner*, 314 U.S. at 50, 62 S. Ct. at 8 (quoting 45 Cong. Rec. 4034 (1910) (statement of Sen. William Borah)). In *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698, 702, 62 S. Ct. 827, 829 (1942), the U.S. Supreme Court explained:

> The specific declaration in [45 U.S.C. § 56] that the United States courts should have concurrent jurisdiction with those of the several states, and the prohibition against removal, point clearly to the conclusion that Congress has exercised its authority over interstate commerce to the extent of permitting suits in state courts, despite the incidental burden, where process may be obtained on a defendant . . . actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction.

Justice Jackson, concurring, further noted:

> Unless there is some hidden meaning in the language Congress has employed, the injured workman or his surviving dependents may choose from the entire territory served by the railroad any place in which to sue, and in which to choose either a federal or a state court of which to ask his remedy. There is nothing which requires a plaintiff to whom such a choice is given to exercise it in a self-

> denying or large-hearted manner. There is nothing to restrain use of that privilege . . . .

Miles, 315 U.S. at 706-07, 62 S. Ct. at 832 (Jackson, J., concurring).

¶12 The U.S. Supreme Court consistently has interpreted 45 U.S.C. § 56 to allow state courts to hear cases brought under the FELA even where the only basis for jurisdiction is the railroad doing business in the forum state. *E.g.*, *Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379, 73 S. Ct. 749 (1953); *Miles*, 315 U.S. 698, 62 S. Ct. 827. For example, in *Pope*, a plaintiff who resided and was injured in Georgia filed a FELA action against his railroad employer, a Virginia corporation, in Alabama state court. The plaintiff grounded jurisdiction and venue on 45 U.S.C. § 56. The railroad requested an injunction from a Georgia state court pursuant to a Georgia statute providing Georgia courts with the power to enjoin Georgia residents from bringing suits in a foreign jurisdiction. The Georgia Supreme Court ruled in favor of the railroad. The U.S. Supreme Court reversed, holding that 45 U.S.C. § 56 "establishes a petitioner's right to sue in Alabama. It provides that the employee may bring his suit wherever the carrier 'shall be doing business,' and admittedly respondent does business in Jefferson County, Alabama. Congress has deliberately chosen to give petitioner a transitory cause of action . . . ." *Pope*, 345 U.S. at 383, 73 S. Ct. at 751.

¶13 Similarly, in *Miles*, 315 U.S. 698, 62 S. Ct. 827, a Tennessee resident was killed while working for his railroad employer in Tennessee. The railroad was an Illinois corporation. The employee's estate brought suit against the railroad in Missouri. The Tennessee

Court of Appeals, at the railroad's request, permanently enjoined the employee's estate from prosecuting his claim in Missouri. The U.S. Supreme Court reversed, holding:

> Congress has exercised its authority over interstate commerce to the extent of permitting suits in state courts, despite the incidental burden, where process may be obtained on a defendant . . . actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction.

Miles, 315 U.S. at 702, 62 S. Ct. at 829.

¶14 BNSF contends that *Daimler*, ___ U.S. ___, 134 S. Ct. 746, overruled prior U.S. Supreme Court precedent holding the FELA conferred jurisdiction to state courts where the railroad does business. In *Daimler*, Argentinian plaintiffs filed suit in California Federal District Court against DaimlerChrysler Aktiengesellschaft (Daimler), a German public stock company headquartered in Stuttgart that manufactured Mercedes-Benz vehicles in Germany. The complaint alleged that, during Argentina's "Dirty War" from 1976-1983, Daimler's Argentinian subsidiary, Mercedes-Benz Argentina, collaborated with Argentinian security forces to kidnap, detain, torture, and kill Mercedes-Benz Argentina workers. The plaintiffs sought damages for the alleged human rights violations from Daimler under the laws of the United States, California, and Argentina. They predicated jurisdiction over the lawsuit on the California con-

tacts of Mercedes-Benz USA, LLC, an indirect subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey.

¶15 The U.S. Supreme Court granted certiorari "to decide whether, consistent with the Due Process Clause of the Fourteenth amendment, Daimler is amenable to suit in California courts for claims involving only foreign plaintiffs and occurring entirely abroad." *Daimler*, ___ U.S. at ___, 134 S. Ct. at 753. The Court emphasized that "general jurisdiction requires affiliations so 'continuous and systematic' as to render [the foreign corporation] essentially at home in the forum State." *Daimler*, ___ U.S at ___ n.11, 134 S. Ct. at 758 n.11 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 2851 (2011)) (internal quotation marks omitted and changes in original). The Court rejected the plaintiffs' "general or all-purpose" theory of jurisdiction, under which Daimler could be sued "on any and all claims against it, wherever in the world the claims may arise." *Daimler*, ___ U.S. at ___, 134 S. Ct. at 751. The Court determined that such "exorbitant" exercises of personal jurisdiction are "barred by due process constraints on the assertion of adjudicatory authority." *Daimler*, ___ U.S. at ___, 134 S. Ct. at 751. The Court emphasized that "no part of [Mercedes-Benz] Argentina's alleged collaboration with Argentinian authorities took place in California or anywhere else in the United States" and rejected the plaintiffs' attempt to found jurisdiction over Daimler on the California contacts of Mercedes-Benz USA. *Daimler*, ___ U.S. at ___, 134 S. Ct. at 752, 760. In doing so, the Court noted that Mercedes-Benz USA's relationship with Daimler was that of an independent

contractor, and it had no authority to make binding obligations or act on behalf of Daimler. *Daimler*, ___ U.S. at ___, 134 S. Ct. at 752.

¶16 *Daimler* addressed "the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States." *Daimler*, ___ U.S. at ___, 134 S. Ct. at 750. Unlike the cases before us, *Daimler* did not involve a FELA claim or a railroad defendant. Likewise, none of the cases BNSF cites to support its position that *Daimler* precludes state court jurisdiction over FELA claims against railroads involved FELA claims or railroad defendants.[2] In *Daimler*, the U.S. Supreme Court did not address personal jurisdiction under the FELA, nor did it need to: the Court has long held that the FELA does not apply to torts that occur in foreign countries, even when all parties involved are citizens of the United States. *See N.Y. Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 31, 45 S. Ct. 402, 402 (1925); *accord Cox v. Chesapeake Ohio R.R. Co.*, 494 F.2d 349, 350 (6th Cir. 1974) (noting that *Chisholm* is "a firm restriction on the extra territorial application" of the FELA and that "the Supreme Court apparently added to this resolve in *Lauritzen v. Larsen*, [345 U.S. 571, 581, 73 S. Ct. 921, 927 (1953)], wherein it stated that, 'we have held [the FELA] not applicable to an American citizen's injury sustained in Canada while in service of an American employer'").

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[2] In its opening brief, BNSF cites to *BNSF Ry. Co. v. Superior Court*, 235 Cal. App. 4th 591 (Cal. Ct. App. 2015). This case was rendered nonciteable pending review by the California Supreme Court in *BNSF Ry. Co. v. Superior Court*, 352 P.3d 417 (Cal. 2015); therefore, it has no persuasive value.

¶17 Moreover, *Daimler* did not present novel law. Rather, the U.S. Supreme Court emphasized prior holdings that general jurisdiction requires foreign corporations to have affiliations so "continuous and systematic" as to render them "at home" in the forum state. *Daimler*, ___ U.S. at ___, 134 S. Ct. at 749 (citing *Goodyear*, 564 U.S. at 919, 131 S. Ct. at 2851). Congress drafted the FELA to make a railroad "at home" for jurisdictional purposes wherever it is "doing business." *See Kepner*, 314 U.S. at 49-50, 62 S. Ct. at 8 (citing 45 Cong. Rec. at 4034). Therefore, *Daimler* did not overrule decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is "doing business."

¶18 The U.S. Supreme Court's decision in *Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284, 52 S. Ct. 152 (1932), provides further guidance on whether BNSF is subject to suit under the FELA by way of "doing business" in Montana. In *Terte*, the U.S. Supreme Court addressed whether a Missouri state court could entertain a FELA suit against two different railroad companies—the Denver and Rio Grande Western Railroad Company (Rio Grande) and the Atchison, Topeka and Santa Fe Railway Company (Santa Fe). The railroad employee sought damages for injuries sustained in Colorado by the railroad companies' joint negligence. The U.S. Supreme Court addressed the personal jurisdiction of the Missouri court over the two railroads, respectively. The Court held that the Rio Grande could not be sued in Missouri, because:

> The Rio Grande, a Delaware corporation, operates lines which lie wholly within Colorado,

> Utah and New Mexico. It neither owns nor operates any line in Missouri; but it does own and use some property located there. It maintains one or more offices in the State and employs agents who solicit traffic. These agents engage in transactions incident to the procurement, delivery and record of such traffic. It is not licensed to do business in Missouri.

Terte, 284 U.S. at 286, 52 S. Ct. at 153. By contrast, the U.S. Supreme Court held that "the Santa Fe was properly sued" in Missouri, relying on the following facts:

> The Santa Fe, a Kansas corporation, owns and operates railroad lines in Missouri, Kansas, Colorado, and other States. It is licensed to do business in Missouri and has an office and agents in Jackson County[, Missouri]. These agents transact the business ordinarily connected with the operation of a carrier by railroad.

Terte, 284 U.S. at 286, 52 S. Ct. at 153.

¶19 It is undisputed that BNSF owns and operates railroad lines in Montana. BNSF is licensed to do business and has offices and agents in Montana. BNSF's agents in Montana transact business ordinarily connected with the operation of a railroad carrier. Thus, under the U.S. Supreme Court's reasoning in *Terte*, BNSF is "properly sued" in Montana. *See Terte*, 284 U.S. at 287-88, 52 S. Ct. at 153. BNSF is "doing business" in Montana, and Montana courts have general personal jurisdiction over BNSF under 45 U.S.C. § 56.

¶20 This conclusion is in line with the U.S. Supreme Court's "liberal construction" of the FELA in favor of injured railroad workers. *See Urie*, 337 U.S. at 180, 69 S. Ct. at 1030. 45 U.S.C. § 56 does not specify whether the "concurrent jurisdiction" conferred upon the state and federal courts refers only to subject-matter jurisdiction or personal jurisdiction, the U.S. Supreme Court has never given it such an interpretation, and it is not the province of this Court to insert such a limitation. *See* § 1-2-101, MCA ("In the construction of a statute, the office of the judge is . . . not to insert what has been omitted . . . .").

¶21 Moreover, as BNSF's counsel acknowledged at oral argument, BNSF's interpretation of 45 U.S.C. § 56 would mean that a Montana resident, hired and employed by BNSF in Montana, who was injured while working—even temporarily—for BNSF in another state, would not be able to bring his action in the state in which he regularly resides and where his employer regularly conducts business. Such a result is in direct contravention of the FELA's purpose of protecting injured railroad workers from what the U.S. Supreme Court characterized as the "injustice" of having to travel far from home to bring suit against the railroad. *See Kepner*, 314 U.S. at 49-50, 62 S. Ct. at 8. And if Montana residents may sue BNSF in a Montana state court for injuries that occur outside of Montana, so may residents of other states. *See Miles*, 315 U.S. at 704, 62 S. Ct. at 830 ("To deny citizens from other states, suitors under [the FELA], access to [Missouri's] courts would, if [Missouri] permitted access to its own citizens, violate the Privileges and Immunities Clause.") (citing U.S. Const. art. IV, § 2).

¶22 Relying on a case that is factually and legally distinguishable, BNSF asks us to depart from the language of 45 U.S.C. § 56—and from a century of U.S. Supreme Court precedent interpreting it—to conclude that the FELA no longer provides Montana courts with jurisdiction over cases in which the plaintiff was injured outside of Montana. We decline to do so. BNSF does business in Montana; therefore, under the FELA, Montana courts have general personal jurisdiction over BNSF.

¶23 *2. Whether Montana courts have personal jurisdiction over BNSF under Montana law.*

¶24 The FELA does not require states to entertain suits arising under it; rather it empowers them to do so where local law permits. *See Douglas v. N.Y., New Haven & Hartford R.R. Co.*, 279 U.S. 377, 388, 49 S. Ct. 355, 356 (1929) ("[T]here is nothing in the Act of Congress that purports to force a duty upon [State] Courts as against an otherwise valid excuse.") (citation omitted); *Mondou v. N.Y., New Haven & Hartford R.R. Co.* (*Second Employers' Liab. Cases*), 223 U.S. 1, 59, 32 S. Ct. 169, 179 (1912) ("[R]ights arising under [the FELA] may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion."). However, "the Federal Constitution prohibits state courts of general jurisdiction from refusing to [enforce the FELA] solely because the suit is brought under a federal law." *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233-34, 54 S. Ct. 690, 692 (1934). *See also Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 364-65, 72 S. Ct. 312, 316 ("[N]o State which gives its courts jurisdiction over common law actions for negligence may deny access to its courts for

a negligence action founded on the [FELA]."). Further, the existence of jurisdiction "creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." *Mondou*, 223 U.S. at 58, 32 S. Ct. at 178.

¶25 Montana courts conduct a two-step inquiry to determine whether the exercise of personal jurisdiction over a nonresident defendant is appropriate. *Edsall Constr. Co. v. Robinson*, 246 Mont. 378, 381, 804 P.2d 1039, 1041 (1991). First, we determine whether jurisdiction exists pursuant to M. R. Civ. P. 4(b)(1). If it does, we next determine "whether the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice embodied in the due process clause." *Simmons Oil Corp. v. Holly Corp.*, 244 Mont. 75, 83, 796 P.2d 189, 193 (1990).

¶26 Personal jurisdiction can be either general or specific. Specific jurisdiction "focuses on the relationship among the defendant, the forum, and the litigation, . . . and depends on whether the defendant's suit-related conduct created a substantial connection with the forum state." *Tackett*, ¶ 19 (citations and internal quotation marks omitted). Conversely, general jurisdiction exists over "[a]ll persons found within the state of Montana." M. R. Civ. P. 4(b)(1). A nonresident defendant that maintains "substantial" or "continuous and systematic" contacts with Montana is "found within" the state and may be subject to Montana's jurisdiction, even if the cause of action is unrelated to the defendant's activities within Montana. *Tackett*, ¶ 20 (quoting *Simmons Oil Corp.*, 244 Mont. at 83, 796 P.2d at 194).

¶27 BNSF does not dispute that it conducts business in Montana by operating trains and maintaining traffic offices. According to BNSF, it has over 2,000 miles of railroad track and more than 2,000 employees in Montana. BNSF maintains facilities in Montana, owns real estate in Montana, has a telephone listing in Montana, and does direct advertising in Montana with Montana media. Each of these factors is significant in determining whether general jurisdiction over BNSF exists. *See Bedrejo v. Triple E Can., Ltd.*, 1999 MT 200, ¶¶ 8, 12, 295 Mont. 430, 984 P.2d 739. Though BNSF alleges that its revenues from Montana represent less than ten percent of its nationwide business, that fact alone does not defeat personal jurisdiction. *See Reed v. Am. Airlines*, 197 Mont. 34, 36, 640 P.2d 912, 914 (1982) (holding that a nonresident corporation's activities "must comprise a significant component of the company's business, although the percentage as related to total business may be small" for personal jurisdiction purposes). Judge Baugh, though he granted BNSF's motion to dismiss, recognized that BNSF "has way more than minimum contacts with the State of Montana. It is a significant, substantial, continuous and systematic business enterprise in Montana even though its operations in some of the 27 other states it operates in are far greater." With that aspect of Judge Baugh's opinion, we agree: BNSF maintains substantial, continuous, and systematic contacts with Montana. Thus, BNSF is "found within" the state under M. R. Civ. P. 4(b)(1). *See Tackett*, ¶ 20.

¶28 Given that personal jurisdiction exists pursuant to M. R. Civ. P. 4(b)(1), we next determine whether exercising personal jurisdiction over BNSF comports

with the due process clause. *Simmons Oil Corp.*, 244 Mont. at 82-83, 796 P.2d at 193. BNSF's contention that it is not subject to personal jurisdiction in Montana courts is largely based on its incorrect interpretation of *Daimler*, discussed in our resolution of Issue 1. In contrast to BNSF's position, we have held that "[t]he District Courts of Montana clearly have jurisdiction" to hear FELA cases. *Labella*, 182 Mont. at 204, 595 P.2d at 1186. We also have followed federal case law in giving the FELA a liberal construction to accomplish its humanitarian and remedial purposes. *Davis v. Union Pac. R.R.*, 282 Mont. 233, 245, 937 P.2d 27, 34 (1997). This is especially true regarding a plaintiff's forum selection under the FELA, *Davis*, 282 Mont. at 245-46, 937 P.2d at 34, "even if that choice of forum involves forum shopping," *State ex rel. Burlington N. R.R. v. District Court*, 270 Mont. 146, ___, 891 P.2d 493, 499 (1995) (rejecting BNSF's motion to dismiss an out-of-state FELA plaintiff's claim notwithstanding the doctrine of forum non conveniens and § 25-2-201, MCA).

¶29 Our own precedent on this issue is consistently clear and consonant with the U.S. Supreme Court's interpretation of 45 U.S.C. § 56. In *Labella*, 182 Mont. at 207, 595 P.2d at 1187, we explained:

> The policy of the State of Montana is clearly announced in the State Constitution. 'Courts of justice shall be open to every person, and speedy remedy afforded for every injury to person, property, or character.' 1972 Mont. Const., Art. II, § 16. This constitutional right is unrestricted by reference to residence or citizenship. Indeed, such qualification could not

pass muster under the Privileges and Immunities Clause of Art. IV, § 2 of the United States Constitution.

If Montana courts have personal jurisdiction over BNSF for FELA cases brought by Montana residents, Montana courts necessarily must have personal jurisdiction over BNSF for FELA cases brought by nonresidents.

¶30 Under Montana law, Montana courts have general personal jurisdiction over BNSF.[3]

CONCLUSION

¶31 Montana courts have general personal jurisdiction over BNSF under the FELA and Montana law. We therefore affirm Judge Moses' order denying BNSF's motion to dismiss Tyrrell's complaint, and we reverse Judge Baugh's order granting BNSF's motion to dismiss Nelson's complaint. We remand both cases for further proceedings consistent with this Opinion.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ PATRICIA COTTER
/S/ BETH BAKER
/S/ MICHAEL E WHEAT
/S/ JIM RICE

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[3] Because we resolve the consolidated appeals on this issue, we need not address the plaintiffs' contention that BNSF consented to personal jurisdiction.

Justice Laurie McKinnon, dissenting.

¶32 I respectfully dissent from the Court's opinion. I would conclude that the District Courts lack general (all-purpose) personal jurisdiction over BNSF in the consolidated appeals under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The United States Supreme Court has made clear twice within the last five years that a state court may assert general jurisdiction over a foreign corporation under the Due Process Clause of the Fourteenth Amendment "only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render it essentially at home in the forum State.'" *Daimler AG v. Bauman*, ___ U.S. ___, 134 S. Ct. 746, 751 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 2851 (2011)) (brackets omitted). The United States Supreme Court has made it equally clear that merely "engag[ing] in a substantial, continuous, and systematic course of business" with the forum State is insufficient standing alone to subject a defendant to general jurisdiction. *Daimler*, 134 S. Ct. at 761. Such a formulation, the Supreme Court has explained, would be "unacceptably grasping." *Daimler*, 134 S. Ct. at 761.

¶33 Disregarding the United States Supreme Court's express holdings in *Goodyear* and in *Daimler*, this Court entirely rejects the "at home" standard in favor of substantially the same formulation that the Supreme Court rejected. Despite the United States Supreme Court's conclusion that permitting general jurisdiction wherever a nonresident defendant is engaging in a substantial, continuous, and systematic course of business would deprive the defendant due

process of law, this Court holds that BNSF can be haled into Montana state courts under the "doing business" standard. The reasons that this Court gives for disregarding the Supreme Court's "at home" formulation and adopting the "doing business" standard are, in my view, unpersuasive. This case is quite clearly controlled by the United States Supreme Court's holdings in *Goodyear* and *Daimler* and the "at home" standard set forth therein.

I.

¶34 The Court does not contend, nor could it seriously contend, that the plaintiffs are able to satisfy the "at home" standard enunciated by the United States Supreme Court in *Goodyear* and in *Daimler*. In *Goodyear*, decided in 2011, the Supreme Court held that under the Due Process Clause a "court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear*, 564 U.S. at 919, 131 S. Ct. at 2851. In the wake of *Goodyear*, many legal commentators—who had come to believe that general jurisdiction could be exercised wherever a corporation engaged in continuous and systematic business—openly questioned whether the Supreme Court actually intended to impose such a stringent standard for general jurisdiction under the Due Process Clause. *See, e.g.*, Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 Geo. Wash. L. Rev. 202, 214-15, 217 (2011) (contending that the Court's restriction of general jurisdiction to corporations that are "essentially at home" should be dismissed as "loose language").

¶35 In *Daimler*, decided three years later, the Court reaffirmed its holding in *Goodyear* and expanded upon its earlier analysis. In *Daimler*, the plaintiffs brought suit in California federal court against the German corporation Daimler, the manufacturer of Mercedes-Benz automobiles, seeking damages under federal statutory law on the theory that Daimler unlawfully aided the commission of horrific human rights violations against them in Argentina. The plaintiffs maintained that the federal court could exercise general jurisdiction over Daimler because of the "substantial, continuous, and systematic" contacts in California of Daimler's wholly owned subsidiary, Mercedes-Benz USA, who operates "multiple California-based facilities" and is "the largest supplier of luxury vehicles to the California market." *Daimler*, 134 S. Ct. at 752.

¶36 The Court assumed, for purposes of its personal jurisdiction analysis, that Mercedes-Benz USA's contacts were fully imputable to Daimler. Still, even with the contacts of Mercedes-Benz fully attributable to Daimler, the Court rejected the contention that Daimler was subject to general jurisdiction in California. The Court held that the standard of "substantial, continuous, and systematic course of business" was "unacceptably grasping" and "exorbitant," explaining that the Due Process Clause imposes a more stringent standard for state courts attempting to exercise general jurisdiction. *Daimler*, 134 S. Ct. at 761. The Court explained that the proper inquiry for purposes of general jurisdiction "is *not* whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,'" but rather "whether that corporation's affiliations with the State

are *so* 'continuous and systematic' as to *render it essentially at home* in the forum State." *Daimler*, 134 S. Ct. at 752 (quoting *Goodyear*, 564 U.S. at 919, 131 S. Ct. at 2851) (brackets and internal quotation marks omitted) (emphasis added). A corporation is "essentially at home," the Court instructed, where it is incorporated or where it has its principal place of business. *Daimler*, 134 S. Ct. at 760. The Court explained that only in an "exceptional case" will a corporation be deemed essentially at home in another State. *Daimler*, 134 S. Ct. at 761 n.19.

¶37 Here, there is no dispute that BNSF's affiliations with Montana are not so substantial as to render it essentially "at home" in this State. BNSF is not incorporated under the laws of Montana, nor does it have its principal place of business in Montana. These two facts alone are strong evidence that BNSF is not at home in Montana. "With respect to a corporation, the place of incorporation and principal place of business are 'paradigm bases for general jurisdiction.'" *Daimler*, 134 S. Ct. at 760 (brackets, ellipsis, and citation omitted). "Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." *Daimler*, 134 S. Ct. at 760. It is only in an "exceptional case" that a State will have general jurisdiction over a corporation outside of its place of incorporation and principal place of business. *Daimler*, 134 S. Ct. at 761 n.19.

¶38 There is nothing exceptional about BNSF's contacts with Montana that would permit general jurisdiction. While BNSF certainly conducts substantial business in Montana, "the general jurisdiction inquiry

does not 'focus solely on the magnitude of the defendant's in-state contacts.'" *Daimler*, 134 S. Ct. at 762 n.20 (brackets and citation omitted). Indeed, in *Daimler*, the Court refused to find personal jurisdiction despite the fact that Mercedes-Benz USA distributes tens of thousands of cars to California, generates billions of dollars in revenue from California, and has multiple facilities in the State, including a regional headquarters. *Daimler*, 134 S. Ct. at 752.[1] "General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Daimler*, 134 S. Ct. at 762 n.20. "A corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler*, 134 S. Ct. at 762 n.20.

¶39 Applying the United States Supreme Court's directive and comparing BNSF's activities in Montana with its nationwide activities, it is clear that BNSF is not at home in Montana. BNSF receives less than 10% of its revenue from Montana; barely 6% of BNSF's total track mileage is located in Montana; and less than 5% of BNSF's total workforce is located in Montana. These percentages, though slightly greater, differ little from those the Court found to be insufficient in *Daimler*. *See Daimler*, 134 S. Ct. at 752 (noting Mercedes Benz USA's sales make up 2.4% of Daimler's worldwide sales).

¶40 In *Daimler*, the Court cited *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 72 S. Ct. 413, as the "textbook" example of an "exceptional case"

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[1] *See also Daimler*, 134 S. Ct. at 763 (Sotomayor, J., concurring).

where general jurisdiction may exist outside the corporation's place of incorporation and principal place of business. In *Perkins*, the defendant company's primary place of business was, because of wartime circumstances, temporarily located in Ohio, where the company was sued. *Perkins*, 342 U.S. 437, 447-48, 72 S. Ct. at 419-20. The Court deemed the place of service in those unusual circumstances "a surrogate for the place of incorporation or head office." *Daimler*, 134 S. Ct. at 756 n.8 (citations omitted). On that basis alone, the Court concluded that Ohio courts could exercise general jurisdiction over the company without offending due process. *Daimler*, 134 S. Ct. at 756. In contrast, BNSF's contacts with Montana are far from establishing a surrogate principal place of business in this State.

¶41 In short, BNSF's contacts with Montana are insufficient to satisfy the due process standard set forth by *Goodyear* and *Daimler* to permit BNSF to be haled into courts of this State. That much is not in dispute. And, in my view, that is where the analysis of this case should come to end.

II.

¶42 Acknowledging that BNSF is not "at home" in Montana, the Court persists that BNSF can be brought before tribunals of this State under a less stringent standard, holding that BNSF need only be "doing business" in Montana for state district courts to sustain general jurisdiction. Opinion, ¶ 12. The Court reasons that the Due Process Clause demands less in this case than in *Goodyear* and in *Daimler* because, unlike in those cases, this case involves a

"FELA claim [and] a railroad defendant." Opinion, ¶ 16.

¶43 I must disagree with the Court's refusal to apply the teachings of *Goodyear* and *Daimler*. Flowing from the Due Process Clause, the requirement that a state court have personal jurisdiction is "first of all an individual right" under the Fourteenth Amendment. *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702, 102 S. Ct. 2099, 2105 (1982). "It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Insurance Corp. of Ireland*, 456 U.S. at 702, 102 S. Ct. at 2104. That is to say, personal jurisdiction imposes a limitation on a state court's power to "protect the liberty of the nonresident defendant." *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115, 1122 (2014).

¶44 I perceive no sound basis to afford BNSF less constitutional protection than the defendants were afforded in *Goodyear* and in *Daimler*. The United States Supreme Court has consistently explained that the inquiry under personal jurisdiction does not focus on the unilateral actions of the plaintiff, but instead focuses on the defendant's relationship with the forum State. *Walden*, 134 S. Ct. at 1122 (citing *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 417, 104 S. Ct. 1868, 1873 (1984)). Indeed, there is no authority for the proposition that the quality or quantity of process afforded a defendant by the requirement of general jurisdiction depends on the type of cause of action pursued by the plaintiff or the occupation of the defendant. A defendant does not forfeit liberty or have a diminished liberty interest merely because the plaintiff brings a FELA action. Nor does a

defendant forfeit constitutional protection by operating a railroad. It is thus altogether immaterial under the general jurisdiction inquiry that the plaintiffs here brought a FELA claim rather than a Torture Victim Protection claim (*Daimler*) or a negligence claim (*Goodyear*). It is likewise wholly immaterial that BNSF operates a railroad as opposed to a car dealership (*Daimler*) or a tire manufacturing operation (*Goodyear*). The Due Process Clause requires a defendant to be "at home" to be subject to general jurisdiction in the forum State, *Daimler*, 134 S. Ct. at 754, and the Supreme Court has defined "at home" for a corporation as "the place of incorporation" and the "principal place of business" of the corporation. *Daimler*, 134 S. Ct. at 760. In so doing, the Court has established the minimum, base-line guarantee of due process that must be afforded defendants by the Constitution of the United States. BNSF should not be haled into a state court in Montana under any less stringent of a standard. Simply put, there is not a different, less protective Due Process Clause for BNSF; it is entitled to the same due process of law as every other defendant.

¶45 The Court persists that a "century" of United States Supreme Court precedent dictates otherwise, Opinion, ¶ 22, reasoning that "decades of consistent" Supreme Court decisions show that a nonresident railroad is subject to general jurisdiction wherever the railroad is "doing business." Opinion, ¶ 17. Remarkably, the Court arrives at this conclusion *without citing a single* general jurisdiction case. The Court instead cites three United States Supreme Court decisions—*Pope, Miles*, and *Terte*—having nothing to do with general jurisdiction under the Due Process

Clause. In *Pope* and in *Miles*, the Supreme Court addressed whether FELA prevented state courts from using their equitable powers to enjoin their residents from bringing vexatious suits in other state courts. *Pope*, 345 U.S. at 380, 73 S. Ct. at 750; *Miles*, 315 U.S. at 699, 62 S. Ct. at 828. In *Terte*, the Court addressed whether interstate commerce is unduly burdened by bringing an action under FELA in respect to an injury sustained in another State. *Terte*, 284 U.S. at 287, 52 S. Ct. at 153. These cases do not so much as mention the Due Process Clause or general jurisdiction. Nor have the cases ever been cited by the United States Supreme Court or any other court—until now—for any proposition remotely related to general jurisdiction. This claimed "century" of United States Supreme Court precedent permitting general jurisdiction wherever a nonresident railroad is doing business simply does not exist.

¶46 Further, even if the cases cited by the Court actually stood for the propositions cited for, it would not matter. Notwithstanding the Court's statement that these cases show "decades of consistent" precedent, none of the cited cases were decided within the last six decades. In *Daimler*, the plaintiffs emphasized earlier Supreme Court decisions that seemingly upheld general jurisdiction under a formulation less stringent than the "at home" standard. The Supreme Court, however, refused to follow these decisions, explaining that they were decided in a different "era" before modern general jurisdiction developed. *Daimler*, 134 S. Ct. at 761 n.18. After dismissing the decisions in a footnote, the Court made clear once again that the proper inquiry under the Due Process Clause is whether a nonresident corporation's contacts are so

constant and pervasive as to render it "essentially at home in the forum State." *Daimler*, 134 S. Ct. at 761. Thus, whatever standard earlier decisions may or may not have used, the Supreme Court has now made clear that the Due Process Clause of the Fourteenth Amendment requires a defendant to be "at home" in the forum State to be subject to general jurisdiction.

¶47 Lastly, the Court contends that Congress, *not* the Constitution, controls the sufficiency of process that is required to hale BNSF into state courts in Montana. Pushing aside the constitutional restrictions imposed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Court maintains that Congress has conferred general jurisdiction under 45 U.S.C. § 56 of FELA, to state courts and has chosen to provide BNSF with less protection than the United States Supreme Court has held is required by the Due Process Clause.

¶48 I again must disagree with the Court. Congress did not, nor could it, do so. First, Congress did not confer personal jurisdiction with the passage of 45 U.S.C. § 56. Section 56 is a venue statute for the federal courts, not a grant of personal jurisdiction to state courts. The United States Supreme Court has made this point clear: 45 U.S.C. § "[5]6 establishes *venue* for an action in the *federal* courts." *Balt. & O. R. Co. v. Kepner*, 314 U.S. 44, 52, 62 S. Ct. 6, 9 (1941) (emphasis added). Indeed, the "phrasing of the section is not unique: it follows the familiar pattern generally employed by Congress in framing venue provisions." *Kepner*, 314 U.S. at 56, 62 S. Ct. at 11 (Frankfurter, J., dissenting) (citing several federal venue statutes). Notably, even the cases the Court cites—for the erroneous proposition that a "century" of Supreme Court

precedent dictates general jurisdiction exists wherever a railroad is doing business—expressly state that § 56 confers venue in the federal courts. *Miles*, 315 U.S. at 710, 62 S. Ct. at 833 ("the provision of § [5]6 'filled the entire field of *venue* in *federal* courts'"); *Pope*, 345 U.S. at 383, 73 S. Ct. at 752 (§ 56 provides an "employee a right to establish *venue* in the *federal* court") (emphasis added). Personal jurisdiction does not result from 45 U.S.C. § 56, and in the century since its enactment, no court has ever concluded that it does.

¶49 Second, assuming for the sake of argument that § 56 does confer personal jurisdiction, it surely does not confer it to state courts. 45 U.S.C. § 56 provides that "an action may be brought in a circuit [district] court *of the United States*, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." (Emphasis added). By its plain language, § 56 applies only to "court[s] of the United States." Seizing on the statute's subsequent language that allows for "concurrent jurisdiction" with the several States, the Court persists that this language grants state courts personal jurisdiction. The phrase "concurrent jurisdiction" is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction. *See* 21 U.S.C. § 467e; 48 U.S.C. § 1704; 21 U.S.C. § 678; 15 U.S.C. § 1829; 29 U.S.C. § 1132(e)(1); *Claflin v. Houseman*, 93 U.S. 130, 134 (1876); *Mims v. Arrow Fin. Servs., LLC*, ___ U.S. ___,

132 S. Ct. 740, 745 (2012).[2],[3] Furthermore, the United States Supreme Court has repeatedly interpreted the concurrent jurisdiction language within 45 U.S.C. § 56 to denote the conveyance of subject-matter jurisdiction. *See, e.g., Chesapeake & Ohio R. Co. v. Stapleton*, 279 U.S. 587, 49 S. Ct. 442 (1929); *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 127 S. Ct. 799 (2007). The congressional grant of concurrent jurisdiction with the several States clearly refers to a grant of subject-matter jurisdiction over FELA actions, not a grant of personal jurisdiction over individual defendants.

¶50 Lastly, Congress lacks authority to confer personal jurisdiction to state courts where the Due Process Clause of the Fourteenth Amendment would prohibit it. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." The United States Supreme Court has made clear that the Constitution "grants Congress no power to restrict, abrogate, or dilute these guarantees." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732, 102 S. Ct. 3331, 3340 (1982). Indeed, it is well established that "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Hogan*, 458 U.S. at 732, 102 S. Ct. at 3340 (citing *Califano v.*

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[2] In fact, the term dates back even before the passage of the United States Constitution to mean jurisdiction over the cause of action. *See* The Federalist No. 82, p 132 (E. Bourne ed. 1947, Book II) (A. Hamilton).

[3] In conducting research, I could not find a single court that has ever construed concurrent jurisdiction to mean anything other than jurisdiction over the subject matter.

Goldfarb, 430 U.S. 199, 210, 97 S. Ct. 1021, 1028 (1977); *Williams v. Rhodes*, 393 U.S. 23, 29, 89 S. Ct. 5, 10 (1968)).

¶51 As explained above, the requirement that a state court have personal jurisdiction flows from the Due Process Clause of the Fourteenth Amendment and protects the individual "liberty of the nonresident defendant." *Walden*, 134 S. Ct. at 1122. The United States Supreme Court has held that consistent with the guarantee of individual liberty that Clause prohibits a nonresident defendant from being haled into a state court for all purposes unless the defendant's "affiliations with the State in which suit is brought are so constant and pervasive 'as to render it essentially at home in the forum State.'" *Daimler*, 134 S. Ct. at 751 (quoting *Goodyear*, 564 U.S. at 919, 131 S. Ct. at 2851) (brackets omitted). Congress cannot by way of 45 U.S.C. § 56, or any federal law, "restrict, abrogate, or dilute" that constitutional guarantee. *Hogan*, 458 U.S. at 732, 102 S. Ct. at 3340.

III.

¶52 In sum, the Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." That Clause prohibits a state court from exercising general jurisdiction over a nonresident defendant unless the defendant's contacts with the State are so pervasive as to render the defendant essentially "at home" in the State. *Daimler*, 134 S. Ct. at 751. Because there is no dispute that BNSF's contacts are not so pervasive as to render it essentially at home in Montana, I would conclude that the two Montana

State District Courts in the consolidated appeals lack general jurisdiction over BNSF under the Due Process Clause of the Fourteenth Amendment.

¶53 The Court does not address whether BNSF consented to jurisdiction in Montana, and I will reserve judgment on that issue as well. For unless the United States Supreme Court meant something other than what it said, I will get an opportunity to ultimately provide my thoughts on that argument in the future.

¶54 I respectfully dissent.

/S/ LAURIE McKINNON

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF MONTANA

DA 14-0825

KELLI TYRRELL, as Special Administrator
for the Estate of BRENT T. TYRRELL, deceased,
Plaintiff and Appellee,

v.

BNSF RAILWAY CO.,
Defendant and Appellant.

Defendant/Appellant BNSF Railway Co. (BNSF) has filed a notice of appeal from the order of the Thirteenth Judicial District Court denying its motion to dismiss this action for lack of personal jurisdiction. BNSF moved to certify the order as final, and Plaintiff/Appellee Kelli Tyrrell did not object or respond to the motion. The District Court thereafter issued an order granting BNSF's motion and certifying the order as a final judgment.

Pursuant to M. R. App. P. 6(3)(c), an order denying a motion to dismiss for lack of subject matter jurisdiction is appealable without certification, but an order denying dismissal on personal jurisdiction grounds is not. We have reviewed the District Court's Rule 54(b) certification order and determine that it satisfies the requirements of M. R. Civ. P. 54(b) and M. R. App. P. 6(6). Accordingly,

IT IS ORDERED, pursuant to M. R. App. P. 4(4)(b), that this appeal shall proceed in accordance with the Montana Rules of Appellate Procedure.

The Clerk is directed to provide copies of this order to all counsel of record and to the Honorable Michael Moses, presiding District Judge.

DATED this 13th day of January, 2015.

s/
Chief Justice

s/
s/
s/
s/
Justices

APPENDIX C

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

ROBERT M. NELSON, Plaintiff, vs. BNSF RAILWAY COMPANY, a Delaware corporation, Defendant.	Cause No: DV-11-417 Judge: G. Todd Baugh **MEMORANDUM AND ORDER**

Before the Court is Defendant's Rule 12(b)(2) Motion to Dismiss. The Motion is briefed and deemed submitted.

Plaintiff is a resident of North Dakota, alleging a FELA based claim against the Defendant that occurred in the State of Washington.

I believe 3 Judges in this District have faced similar Motions which they have denied based on applicable precedent. Their rulings seem sound but do not look at whether based on common sense it may be time to reassess FELA cases in Montana which have no forum related connection. The U.S. Supreme Court case of *Daimler v Bauman* (2014), 134 S.Ct. 746 gives us that opportunity.

I.

Currently, this Department (No. 5 of 6 in the Thirteenth Judicial District) has about 12 FELA cases

pending where the Plaintiff is not a Montana resident and where there are no Montana related acts or omissions. There are 52 weeks in a year, about half of which are available for civil jury trials. Allowing for holidays and vacation time leaves maybe 24 weeks for civil jury trials. Scheduling 12 FELA cases that common sense says should be pursued in a different state does have an impact on scheduling civil jury cases of Montana citizens. In about 8 of these cases, the only Montana citizen that wants the cased tried in Montana is Plaintiff's attorney; in the others, not even Plaintiff's lead attorney is a Montana citizen.

Plaintiff point out that in 1945, the U.S. Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, held that in order to subject appellant to judgment, due process required only that the defendant have certain minimum contacts with the forum state, such that the maintenance of the suit did not offend traditional notions of fair play and substantial justice. Plaintiff's Response Brief, p. 10.

Montana citizens support the Montana Courts with their tax dollars. Are Montana citizens entitled to a little due process, fair play and substantial justice? I submit they are and that a North Dakota resident injured in a State of Washington accident should not burden the Montana taxpayer with his pursuit of justice that common sense tells us all ought to be pursued in North Dakota or Washington.

II.

The Defendant in this case has way more than minimum contacts with the State of Montana. It is a significant, substantial, continuous and systematic

business enterprise in Montana even though its operations in some of the 27 other states it operates in are far greater. It is and expects to be in Court in Montana concerning its operations in Montana, Defendant is found in this state and is subject to the jurisdiction of Montana courts. Rule 4(b) Mt. Rules of Civ. Pro.

How extensively is it subject to the jurisdiction of Montana Courts? Certainly as far as the balance of Rule 4, *supra*, indicates: for claims of relief arising from the doing of business in Montana and arising from any accident resulting in accrual within Montana for a tort action. So, certainly, Defendant's acts and omissions in Montana subject it to the jurisdiction of Montana Courts. This is specific jurisdiction and is no less than what common sense leads us all to know and expect.

III.

But Plaintiff asserts that Montana has general, all-purpose, jurisdiction of Defendant. The questions are: Does it? Should it? And, if so, must it be exercised?

Daimler, supra, a case easily distinguished factually, nonetheless, is the latest word on general jurisdiction and should not be ignored. *Daimler, supra*, speaks in terms of a Defendant's affiliations with a state being so continuous and systematic as to render it essentially at home in the forum state; comparable to a domestic enterprise in the forum state.

Daimler, supra, reasserted from *Goodyear* (citation omitted) that only a limited set of affiliation with a forum state will render a defendant amenable to all purpose jurisdictions. Further, the Court remarked

that general jurisdiction for an individual is his domicile; and for a corporation, an equivalent place, one in which the corporation is fairly regarded as at home.

There seems to be little question that Defendant BNSF would be domiciled or at home in Delaware where it is incorporated or in Texas where its principal place of business is located.

Is BNSF at home in Montana, too? *Daimler* and *Goodyear*, *supra*, tell us that the exercise of general jurisdiction in every state in which a corporation engages in a substantial, continuous and systematic course of business is unacceptably grasping. "At home" is not synonymous with "doing business".

I submit that if Defendant BNSF is "at home" in Montana, it is also "at home" in most, if not all, of the 27 other states in which it operates. Thus, do all these 28 states have general jurisdiction of Defendant BNSF enabling them to hale the BNSF into Court to answer any claims arising anywhere?

IV.

Article II, Section 16, of the Montana Constitution open our Courts to all, denying none. Citizenship, domicile and residency are not factors. Article II, Section 17, provides that no one is to be deprived of life, liberty or property without due process of law.

Jurisdiction in FELA cases is found at 45 U.S.C., § 56. Plaintiff is allowed to file this case in a U.S. District Court in the District where he resides (North Dakota) or in which the cause of action arose (Washington) or in any U. S. District Court in any State in which BNSF does business (those 28 states, which in-

clude North Dakota and Washington). And, this jurisdiction is made concurrent with State Courts (including North Dakota, Montana and Washington).

Thus, has Congress allowed the State of Montana jurisdiction over FELA cases. Congress has not imposed jurisdiction of FELA cases as it does not have that authority. Whatever jurisdiction Montana exercises is limited by due process rights of the parties.

As a practical matter, if these parties, in this case, are allowed to try this case in Montana, it would not be a momentous decision. However, it will be precedent for anyone anywhere to file a case in Montana claiming general all-purpose jurisdiction over any defendant for any relief if the Defendant meets whatever standards exist in Montana for general all purpose jurisdiction.

Based on *Daimler*, *supra*, this Court concludes that Defendant's due process rights prevent this Court from exercising general all-purpose jurisdiction over the Defendant and this Court does not have specific jurisdiction.

Based on common sense, we all know that this case should only be in a U. S. District Court in one of the 28 states where the Defendant does business, or in a State Court in North Dakota or Washington.

IT IS ORDERED that Defendant's Motion is GRANTED and this case is DISMISSED.

DATED this 18th day of November, 2014.

s/
HON. G. TODD BAUGH,
DISTRICT COURT JUDGE

* * *

APPENDIX D

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

KELLI TYRRELL, as Special Administrator for the Estate of BRENT T. TYRRELL (deceased) Plaintiff, vs. BNSF RAILWAY COMPANY, a Delaware Corporation, Defendant.	Cause No.: DV 14-699 Judge Michael G. Moses **ORDER GRANTING DEFENDANT'S RULE 54(b) MOTION TO CERTIFY THIS COURT'S *ORDER DENYING DEFENDANT'S RULE 12(b)(2) MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION* AS A FINAL JUDGMENT**

This matter comes before the Court on Defendant BNSF Railway Company's (hereafter BNSF) Rule 54(b) Motion to Certify this Court's *Order Denying Defendant's 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction* as a Final Judgment filed with this Court on October 27, 2014. No response or objection has been filed in response and the time for such response has run. The Court, having considered the arguments of counsel, and for good cause appearing therefore:

IT IS HEREBY ORDERED that BNSF's Rule 54(b) Motion is hereby GRANTED.

DATED this 14th day of November 2014.

s/
DISTRICT JUDGE

Memorandum

Background

Kelli Tyrrell was appointed in South Dakota as Personal Representative for the Estate of Brent T. Tyrrell and filed the Complaint in this case on May 16, 2014. Complaint, ¶ II. Kelli Tyrrell, as Brent T. Tyrrell's widow, brings this action individually and on behalf of the heirs of Decedent Brent T. Tyrrell. Complaint, ¶ VIII. Plaintiff alleges at the time of his injuries, Decedent had been employed by Defendant BNSF Railway Company, a Delaware Corporation with a principal place of business in Texas. Complaint, ¶ IV.

Plaintiff alleges that over the course of Decedent's career with BNSF, and while working within the scope of his employment with BNSF, Decedent was exposed to carcinogenic chemicals which caused Decedent suffering and premature death. Complaint, ¶ V. Plaintiff alleges that Defendant was negligent and in violation of the Federal Employers' Liability Act (FELA), the Locomotive Inspection Act, Federal Railroad Administration Regulations, and other safety statutes and regulations pertaining to railroad employees and is thus responsible for Decedent's injuries and death. Complaint, ¶ VI. Decedent passed away on September 11, 2011. Complaint, ¶ VII. Defendant

has moved for certification of this Court's *Order Denying Defendant's 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction* as a final judgment, which is the subject of this Memorandum and Order.

Legal Standard

Rule 54(b), M.R.Civ.P. provides as follows:

> (b) Judgment on Multiple Claims or Involving Multiple Parties.
>
> (1) When an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim, or third-party claim – or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.
>
> (2) Any order or other decision granted pursuant to Rule 54(b)(1) must comply with the certification of judgment requirements of Montana Rule of Appellate Procedure 6(6).

The Montana Supreme Court has provided factors for the court to consider with respect to Rule 54(b) motions. The factors are:

1. The relationship between the adjudicated and unadjudicated claims;

2. The possibility that the need for review might or might not be mooted by future developments in the district court;

3. The possibility that the reviewing court might not be obliged to consider the same issue a second time;

4. The presence or absence of a claim or counterclaim which could result in a setoff against the judgment sought to be made final;

5. Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like.

Roy, 610 P.2d at 1189 (citation omitted).

Weinstein v. University of Montana, 271 Mont. 435, 898 P.2d 101, 105, 1995 5 Mont. LEXIS 130. The Court in *Weinstein* indicated that "[d]epending on the particular case, some or all of the factors may bear upon the propriety of the order granting Rule 54(b) certification."

Discussion

This case meets the requirements for Rule 54(b) certification for the reasons that follow. This case contains more than one request for relief. The overarching claim for relief is for personal injuries and/or wrongful death alleged to have occurred during Plaintiffs employment with BNSF. BNSF seeks to have certified through its Rule 54(b) motion the single issue of personal jurisdiction over BNSF in this particular

case. There are several cases pending in this Court with similar factual circumstances with respect to personal jurisdiction over BNSF. A final ruling on personal jurisdiction is essential to the parties' resolution of this case and certifying this Court's order will expedite resolution of this case.

Directing final judgment on the single issue of personal jurisdiction meets with the requirements of Rule 54(b), M.R.Civ.P. because it relates to only one claim, and not all claims, in this case. Directing final judgment on the issue of personal jurisdiction over BNSF is also necessary in this case because this district has many pending cases with the exact same issue. It is in the interest of judicial economy to grant BNSF's 54(b) order.

Considering the factors provided in the *Weinstein* case, supra., the Court finds the following:

1. The relationship between the adjudicated and unadjudicated claims.

The adjudicated claim in this case is that of personal jurisdiction. This Court found that this Court has personal jurisdiction over BNSF in this case. The outcome of an appeal of this issue has a major impact on the unadjudicated claims in this case. As such, this factor weighs in favor of certification.

2. The possibility that the need for review might or might not be mooted by future developments in the district court.

The need for review will not be mooted by future developments in the district court as this Court has ruled consistently on all Rule 12(b)(2) motions made by BNSF with facts substantially similar to those in

this case. As such, this factor weighs in favor of certification.

3. The possibility that the reviewing court might not be obliged to consider the same issue a second time.

This would be an issue of first impression for the Montana Supreme Court. This factor weighs in favor of certification.

4. The presence or absence of a claim or counterclaim which could result in a setoff against the judgment sought to be made final.

The Court finds this factor is not applicable in this case.

5. Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like.

The Court finds this factor is not applicable in this case.

In sum, the issue BNSF seeks to have certified in this case as a final judgment meets the requirements provided in Rule 54(b), M.R.Civ.P; the factors articulated in the *Weinstein* case weigh in favor of certification; and no objection or response from Plaintiff has been provided for this Court's consideration. Therefore, the Court hereby **GRANTS** BNSF's Rule 54(b) 9 Motion to Certify this Court's *Order Denying Defendant's 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction.*

* * *

APPENDIX E

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

KELLI TYRRELL, as Special Administrator for the Estate of BRENT T. TYRELL (deceased), Plaintiff, vs. BNSF RAILWAY COMPANY, a Delaware Corporation, Defendant.	Cause No.: DV 14-699 Judge Michael G. Moses **ORDER DENYING DEFENDANT'S RULE 12(b)(2) MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

This matter comes before the Court on Defendant BNSF Railway Company's (hereafter BNSF) Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction filed with this Court on July 7, 2014. Plaintiff Kelli Tyrrell filed with the Court a Memorandum of Law in Opposition to Defendant's Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction on July 21, 2014. BNSF filed a reply brief on August 7, 2014. The Court, having considered the arguments of counsel, and for good cause appearing therefore:

IT IS HEREBY ORDERED that BNSF's Rule 12(b)(2) Motion to Dismiss is DENIED.

DATED this 7th day of October 2014.

s/
DISTRICT JUDGE

Memorandum

Background

Kelli Tyrrell was appointed in South Dakota as Personal Representative for the Estate of Brent T. Tyrrell and filed the Complaint in this case on May 16, 2014. Complaint, ¶ II. Kelli Tyrrell, as Brent T. Tyrrell's widow, brings this action individually and on behalf of the heirs of Decedent Brent T. Tyrrell. Complaint, ¶ VIII. Plaintiff alleges at the time of his injuries, Decedent had been employed by Defendant BNSF Railway Company, a Delaware Corporation with a principal place of business in Texas. Complaint, ¶ IV.

Plaintiff alleges that over the course of Decedent's career with BNSF, and while working within the scope of his employment with BNSF, Decedent was exposed to carcinogenic chemicals which caused Decedent suffering and premature death. Complaint, ¶ V. Plaintiff alleges that Defendant was negligent and in violation of the Federal Employers' Liability Act (FELA), the Locomotive Inspection Act, Federal Railroad Administration Regulations, and other safety statutes and regulations pertaining to railroad employees and is thus responsible for Decedent's injuries and death. Complaint, ¶ VI. Decedent passed away on September 11, 2011. Complaint, ¶ VII. Defendant has moved for dismissal for lack of personal jurisdiction pursuant to Rule 12(b)(2), M.R.Civ.P., which is the subject of this Memorandum and Order.

Legal Standard

Rule 12(b)(2), M.R.Civ.P. provides as follows:

> Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (2) lack of personal jurisdiction.

Section 45 U.S.C. 56 provides the jurisdiction statute for FELA cases:

> No action shall be maintained under this chapter unless commenced within three years from the day and cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Discussion

This Court adopts and incorporates Judge Todd's ruling on the M.R.Civ.P. 12(b)(2) Motion made in the case of Jesse R. Monroy v. BNSF Railway Company, Cause No. DV 13-799. The Tyrrell case differs from the Monroy case regarding alleged injury, witnesses, locations, and Plaintiff; however, Judge Todd's order is directly on point as regards the facts pertinent to Defendant's Rule 12(b)(2) Motion as follows: (1) in both the Monroy case and Tyrrell case the alleged injuries occurred outside the state of Montana; (2) BNSF is the

Defendant in both actions; (3) BNSF is incorporated in Delaware; (4) BNSF's principle place of business is in Texas; and (4) Montana was the chosen forum state to bring each FELA action. Because the necessary factual circumstances of the Tyrrell case align with those in the Monroy v. BNSF case, and because this Court agrees with Judge Todd's rationale for denying BNSF's Rule 12(b)(2) Motion to Dismiss in the Monroy case, this Court hereby adopts and incorporates Judge Todd's Order Denying Defendant's Motion to Dismiss filed on August 1, 2014 in the case of Monroy v. BNSF, Cause No. DV 13-799, a copy of which is attached hereto as Exhibit A.

* * *

EXHIBIT A

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

JESSE R. MONROY, Plaintiff, vs. BNSF RAILWAY COMPANY, a Delaware corporation, Defendant.	Cause No. DV 13-0799 Judge Gregory R. Todd **ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

The Complaint in this case was filed on June 27, 2013, alleging that Jesse R. Monroy (Monroy) was injured while working for Defendant BNSF Railway Company (BNSF) on July 1, 2010. The facts in the Complain are not in dispute. Monroy is a citizen of

Idaho, and BNSF is incorporated in Delaware and has its principal place of business in Texas. Monroy was injured while working in the State of Washington and has now brought suit in the Thirteenth Judicial District for the State of Montana, in Billings, Montana. Monroy seeks relief under the Federal Employers Liability Act (FELA). 45 U.S.C. § 1 *et seq*.

MONTANA JURISDICTION

On April 24, 2014, BNSF filed a motion to dismiss and brief in support thereof. BNSF's motion was made pursuant to Rule 12(b)(2), M.R.Civ.P. Said Rule states:

> "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> ***
>
> (2) lack of personal jurisdiction;"

In essence, BNSF argues that this action in Montana must be dismissed for lack of personal jurisdiction over BNSF because it is made by an Idaho citizen for injuries sustained in Washington in a Montana court.

Both parties agree that when a motion to dismiss is made under Rule 12(b)(2) for lack of personal jurisdiction, a decision must be based on the facts alleged in the complaint, and those facts must be construed in the light most favorable to the plaintiff. Additionally, the motion to dismiss should not be granted unless "it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief." *Threlkeld v. Colorado*, 2000 MT 369, ¶ 7, 303 Mont. 432, 16 P.3d 359.

In Montana, jurisdiction over persons or corporations is found in Rule 4(b)(1), M.R.Civ.P., commonly referred to as long-arm jurisdiction, which reads as follows:

> "All persons found within the State of Montana are subject to the jurisdiction of Montana courts. Additionally, any person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, of any of the following acts:
>
> (A) the transaction of any business within Montana;
>
> (B) the commission of any act resulting in accrual within Montana of a tort action;
>
> (C) the ownership, use, or possession of any property, or of any interest therein, situated within Montana;
>
> (D) contracting to insure any person, property, or risk located within Montana at the time of contracting;
>
> (E) entering into a contract for services to be rendered or for materials to be furnished in Montana by such a person;
>
> (F) acting as director, manager, trustee, or other officer of a corporation organized under the laws of, or having its principal place of business within, Montana; or
>
> (G) acting as personal representative of any estate within Montana." (Emphasis supplied).

In Montana, personal jurisdiction can be characterized as either general or specific. As stated in Rule 4(b)(1), general jurisdiction exists over "all persons found within the State of Montana...."

> "A party is 'found within' the state if he or she is physically present in the state or if his or her contacts with the state are so pervasive that he or she may be deemed to be physically present there. A non-resident defendant that maintains 'substantial' or 'continuous and systematic' contacts within the forum state is found within the state and may be subject to that state's jurisdiction even if the cause of action is unrelated to the defendant's activities within the forum." (Emphasis supplied).
>
> *Simmons Oil Corp. v. Holly Corp*, 244 Mont. 75, 83, 796 P.2d 189, 194 (1990).

A decade after *Simmons*, the Montana Supreme Court again discussed personal jurisdiction and stated that it can either be general jurisdiction or specific jurisdiction. A non-resident defendant found within Montana for general jurisdiction purposes must meet certain criteria:

> "Before the activities of a foreign corporation can create a physical presence within Montana, those activities must be substantial, continuous, and systematic as opposed to isolated, casual, or incidental. The activities must comprise a significant component of the company's business, although the percentage as related to total business may be small." (Emphasis supplied).
>
> *Threlkeld* at ¶ 14.

The exercise of specific jurisdiction over a non-resident defendant can be found pursuant to the subparagraphs A-F of Rule 4(b)(1). In assessing the sufficiency of contacts by a non-resident defendant corporation to find specific jurisdiction in Montana, the Montana Supreme Court adopted in 1990 a Ninth Circuit test to determine if exercising jurisdiction comports with due process:

> "(1) the non-resident defendant must do some act or consummate some transaction within the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking its laws.
>
> (2) the claim must be one which arises out of or results from the defendant's forum-related activities.
>
> (3) the exercise of jurisdiction must be reasonable."
>
> *Simmons*, 244 Mont. at 85, 796 P.2d at 195.

BNSF argues that under the Montana Rules of Civil Procedure, under either a general jurisdiction test or a specific jurisdiction test, BNSF is not found within Montana. BNSF argues that whether analysis of jurisdiction is considered under the found within general jurisdiction requirement or the substantial, continuous and systematic presence specific jurisdiction requirement that jurisdiction over BNSF in this case fails.

Although Monroy argues that jurisdiction is found over BNSF in this Court under both general and specific analyses, it is difficult to find specific jurisdiction.

But BNSF in this case does meet the criteria of being found within Montana and having substantial, continuous and systematic activities within Montana for general jurisdiction purposes under Rule 4(b)(1) pursuant to *Simmons* and *Threlkeld*.

UNITED STATES SUPREME COURT

BNSF also argues that two recent United States Supreme Court cases have further defined as well as limited jurisdiction of courts regarding foreign defendants. In a 2011 case, North Carolina residents filed a wrongful death action in North Carolina State Court regarding a bus accident outside Paris, France, in which their sons died. Plaintiffs alleged that the accident was caused by a defective tire manufactured by the Turkish subsidiary of Goodyear USA. The named defendants were Goodyear USA, an Ohio corporation, and three Goodyear USA subsidiaries from Turkey, France and Luxembourg. Goodyear USA did not contest jurisdiction of the North Carolina courts, but the three foreign subsidiaries argued that North Carolina lacked jurisdiction over them. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US ___, 131 S.Ct. 2846, 2850, 180 L.Ed. 2d 796 (2011).

The first paragraph of the *Goodyear* decision frames the issue:

> "This case concerns the jurisdiction of state courts over corporations organized and operating abroad. We address, in particular, this question: Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?"

Goodyear, 131 S.Ct. at 2850.

The three Goodyear USA subsidiaries were incorporated in their respective countries and are "indirect subsidiaries of Goodyear USA., an Ohio corporation." The subsidiaries manufactured their tires primarily for sale in Europe and Asia. The tires they manufactured "differ in size and construction from tires ordinarily sold in the United States." The tires were "designed to carry significantly heavier loads, and to serve under road conditions and speed limits in the manufacturers' primary markets." *Goodyear*, 131 S.Ct. at 2852.

Goodyear USA did not contest personal jurisdiction of the North Carolina State Court. The three subsidiaries, who were the petitioners in *Goodyear*, were not registered to do business in North Carolina; had no employees, bank accounts or places of business in North Carolina; did not design, manufacture or advertise their products in North Carolina; and they did not solicit business in North Carolina or sell or ship tires themselves to North Carolina customers. The type of tire involved in this accident was manufactured by Goodyear Turkey and was never distributed in North Carolina. *Goodyear*, 131 S.Ct. at 2852.

Such a paucity of contacts described above with North Carolina created:

> "A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction. Such a connection does not establish the 'continuous and systematic' affiliation necessary to empower North Carolina Courts to entertain claims unrelated to the foreign

corporation's contacts with the state." (Emphasis supplied).

Goodyear, 131 S.Ct. at 2851.

The *Goodyear* case went on to state that:

"*International Shoe* distinguished from cases that fit within the 'specific jurisdiction' categories, 'instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.' 326 US at 318, 66 S.Ct. 154, 90 L.Ed 95. Adjudicatory authority so grounded is today called 'general jurisdiction.' (citation omitted). For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded at home." (Emphasis supplied).

Goodyear, 131 S.Ct. at 2853-2854.

BNSF also strongly relies on the very recent United States Supreme Court case of *Daimler AG v. Bauman*, 134 S.Ct. 746, 187 L.Ed. 2d 624 (2014). Justice Ginsburg's first sentence of the *Daimler* opinion states: "This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States." 134 S.Ct. at 750. The plaintiffs in the *Daimler* case were twenty-two Argentinian residents who filed suit against a German public stock company, DaimlerChrysler Aktiengesellschaft (Daimler AG), in U.S.

District Court in California. Plaintiffs asserted claims under two federal statutes, the Alien Tort Statute and the Torture Victim Protection Act, alleging that Mercedes-Benz Argentina, Daimler AG's Argentinian subsidiary, collaborated with Argentinian State Security Forces to kidnap, detain, torture and kill Mercedes-Benz Argentina workers during Argentina's Dirty War from 1976 through 1983. Plaintiffs argued that jurisdiction was proper in Federal District Court in California based on the California contacts of Mercedes-Benz U.S.A., a subsidiary of Daimler AG, which is incorporated in Delaware and has its principal place of business in New Jersey. Mercedes-Benz U.S.A. distributes vehicles that are manufactured by Daimler AG to independent dealerships in the United States, including California. *Daimler*, 134 S.Ct. at 750-751.

The Supreme Court first presented the issue at the start of the decision as:

> "The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint."
>
> *Daimler,* 134 S.Ct. at 751.

Later in the opinion, the Supreme Court stated that, after giving background regarding long-arm jurisdiction, that ..."the question is whether Daimler's affiliations with California are sufficient to subject it to the general (all-purpose) personal jurisdiction of that State's courts." *Daimler*, 134 S.Ct. at 758.

After a discussion of long-arm jurisdiction and the case of *International Shoe Co. v. Washington*, 326 US 10, 66 S.Ct. 154, 90 L.Ed 95 (1945) as well as *Goodyear*, the Supreme Court narrowed the focus of the *Daimler* case:

> "In the proceedings below, the parties agreed on, or failed to contest, certain points we now take as given. Plaintiffs have never attempted to fit this case into the specific jurisdiction category. Nor did plaintiffs challenge on appeal the district court's holding that Daimler's own contacts with California were, by themselves, too sporadic to justify the exercise of general jurisdiction."
>
> *Daimler*, 134 S.Ct. at 758.
>
> The Supreme Court went on to state:
>
> "This Court has not yet addressed whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary."
>
> *Daimler*, 134 S.Ct. at 759.

In further analyzing the case regarding subsidiaries and parent corporations, the Supreme Court stated:

> "Even if we were to assume that Mercedes-Benz USA is at home in California, and further to assume Mercedes-Benz USA's contacts are imputable to Diamler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there."
>
> *Daimler*, 134 S.Ct. at 760.

The *Daimler* Court went on to contrast continuous and systematic from the specific jurisdiction analysis of *International Shoe* to general jurisdiction.

> "Turning to all-purpose jurisdiction, in contrast, *International Shoe* speaks of 'instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit...on causes of action arising from dealings entirely distinct from those activities.' *Id.*, at 318, 66 S.Ct. 154, 90 L.Ed 5 (emphasis added). *See also* Twitchel, Why We Keep Doing Business with Doing-Business Jurisdiction, 2001 U.CHI. Legal Forum 171, 184 (*International Shoe* 'is clearly not saying that dispute-blind jurisdiction exists whenever 'continuous and systematic' contacts are found.') Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so continuous and systematic' as to render [it] essentially at home in the forum State.' (citing *Goodyear*, 131 S.Ct. at 2851)."
>
> *Daimler*, 134 S.Ct., at 761. (Emphasis supplied).

At the end of the above paragraph the U.S. Supreme Court placed Footnote 19. Said Footnote states:

> 'We do not foreclose the possibility that in an exceptional case, see, e.g., *Perkins*, described supra, at ___-___, 187 L.Ed. 2d, at 634-636, and n. 8, a corporation's operations in a forum other than its formal place of incorporation or

> principal place of business may be so substantial and of such a nature as to render the corporation at home in that state. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum state, see infra, at ___, 187 L.Ed. 2d, at 642, quite another to expose it to suits on claims having no connection whatever to the forum state."

The above paragraph from the *Daimler* opinion and Footnote 19 form BNSF's major argument that this Court does not have jurisdiction to hear this case.

The key issue in this case under recent U.S. Supreme Court cases is whether BNSF is at home in Montana so that this action by an Idaho resident for an injury in Washington can be brought in Montana. BNSF argues that, pursuant to *Daimler* and *Goodyear*, that this action can only be filed in Washington (where injury occurred) or Texas (principal place of business) or Delaware (State of incorporation). A very recent United States District Court case disagrees:

> "*Goodyear* did <u>not</u> hold that a corporation may be subject to general jurisdiction <u>only</u> in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose." *Daimler*, 134 S.Ct. at 760 (Emphasis added); *see Goodyear*, 131 S.Ct. at 2855. Nonetheless, 'only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there.' *Ibid*" (Emphasis added).

Air Tropiques, SPRL v. Northern & Western Ins. ___ F. Supp. ___ U.S. District Court, SD, Houston Division (March 31 2014). 2014 WL 1323046.

The *Air Tropiques* case involved an air carrier organized under the laws of the Democratic Republic of Congo filing suit against its own insurance carrier in Texas in a first-party insurance coverage dispute regarding the crash of a Northern & Western insured airplane in the Republic of Congo. In *Goodyear*, the U.S. based parent corporation admitted jurisdiction in North Carolina, but the case involved an accident in France regarding tires that were manufactured by a Goodyear USA Turkish subsidiary on tires that were not sold in the United States. In *Daimler*, suit was brought in California against a German corporation regarding actions of Daimler AG's Argentinian subsidiary for kidnapping, detaining and torturing Argentinian employees of the subsidiary.

In this case, there is no BNSF subsidiary involved. Although Monroy is a foreigner, in the sense that he lives in Idaho and the cause of action arose in the foreign jurisdiction of Washington, Monroy was injured while working for BNSF and not a subsidiary of BNSF. More importantly, this Court does not have to wind its way through a labyrinth of corporate subsidiaries to answer the question of whether it has jurisdiction over a parent corporation. The ties of the subsidiaries in *Daimler* and *Goodyear* to the jurisdiction in which the case was brought were tenuous at best. This tenuous connection of corporate subsidiaries to the court in which the case was brought was the major impediment to the establishment of jurisdiction by the plaintiffs in *Daimler* and *Goodyear*.

In this case, BNSF operates in 28 states in the United States. According to the affidavit of James Obermiller, Director of Corporate Support & Compliance for BNSF, approximately 6% of the track mileage (2,061 of 32,500 total) of BNSF is found in Montana, less than 5% of the employees (2,112 of 43,000 total) are found in Montana, and less than 10% of the revenues for BNSF are generated in Montana. One of BNSF's 24 automotive facilities (4%) is in Montana.

The attachments to the Affidavit of Bob Fain show that BNSF has established 40 new facilities in Montana since 2010 and invested $470 million dollars in Montana in the last four years. In 2014, BNSF is spending system wide $4.1 billion on capital improvements and many are in the Bakken area. In 2010, Montana shipped by BNSF 35.2 million tons of coal, 8.5 million tons of grain and 2.9 million tons of petroleum. Outbound Bakken crude deliveries are expected to jump from 24 locations in 2014 to 50 in 2015. In the last year approximately 57,000 BNSF rail cars of grain per year rode the rails in Montana and 230,000 BNSF rail cars of coal per year go out of Montana. In October 2013, BNSF opened an economic development office in Billings, Montana, because of the heightened amount of business not only for coal and grain in Montana, but in particular the Bakken oil development. These are not insubstantial numbers. *See Threlkeld*, ¶ 14.

The factual settings of *Daimler* and *Goodyear* are clearly distinguishable from this case. This case arises totally in the United States and all parties are American. No corporate subsidiaries are involved in this case - BNSF is the sole defendant. BNSF is at home in Montana in this case as its affiliations with

the State are so continuous and systematic that, pursuant to *Goodyear* and *Daimler*, general jurisdiction over BNSF in Montana is established.

FELA

The argument of BNSF regarding lack of jurisdiction in this case is made more difficult by a number of Montana Supreme Court cases that have dealt with jurisdiction, venue and forum non conveniens in railroad cases. Coupled with the interpretation by the Montana Supreme Court of the Federal Employers Liability Act (FELA), BNSF's argument becomes even tougher. Starting in at least 1959 in dealing with forum non conveniens arguments by railroads, the Montana Supreme Court reflected an open court policy and liberal construction of FELA. "Recognizing the open court policy stated in our Montana Constitution and the FELA policy favoring the injured railway worker's choice of forum, this Court has held the doctrine of forum non conveniens inapplicable to FELA actions brought in Montana's district courts." *Haug v. BNSF* and *Lay v. BNSF*, 236 Mont. 368, 375, 770 P.2d 517, 521 (1989). *See also Bracy v. Great Northern Railway Co.*, 136 Mont. 65, 343 P.2d 848 (1959); *State Ex Rel. Great Northern Railway Co. v. District Court*, 139 Mont. 453, 365 P.2d 512 (1961); *LaBella v. Burlington Northern, Inc.*, 182 Mont. 202, 595 P.2d 1184 (1979); *Bevacqua v. Burlington Northern, Inc.*, 183 Mont. 237, 598 P.2d 1124 (1979); *State Ex Rel. Burlington Northern Railway Co. v. District Court*, 229 Mont. 325, 746 P.2d 1077 (1987).

In *LaBella*, a Washington resident was injured in Washington and filed suit in Lewis & Clark County in

Montana. A motion to dismiss was made by Burlington Northern on the grounds of forum non conveniens. *LaBella*, 182 Mont. at 203, 595 P.2d at 1185. *LaBella* specifically said for the first time that the Montana Supreme Court was "squarely faced with the relation of forum non conveniens to FELA actions." It then went on to cite specifically from the jurisdictional statute of FELA, 45 USC § 56:

> "Under this chapter an action may be brought in a District Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." (Emphasis added).
>
> *LaBella*, 182 Mont. at 204, 595 P.2d at 1186.

LaBella extensively cites the legislative history of FELA jurisdiction. FELA is to be given a liberal construction in favor of injured railroad employees to accomplish its humanitarian and remedial purposes. *LaBella* quotes President Theodore Roosevelt in a 1907 message to Congress as well as a Senate Committee report. Senator Borah from Idaho is specifically quoted in favor of FELA jurisdiction allowing the corporation to be sued at any place where it is carrying on business. Additionally, the refusal in 1947 to pass the Jennings Bill which would have repealed most of the jurisdiction rules for FELA is cited. *LaBella*, 182 Mont. at 205-206, 595 P.2d at 1186.

At least as recently as 2005, the Montana Supreme Court has again reinforced liberal FELA jurisdiction in a change of venue case. *Rule v. Burlington Northern & Sante Fe Ry.*, 2005 MT 6, 325 Mont. 329, 106 P.3d 533. In addition to denying BNSF's motion for change of venue from Dawson County, where the accident arose, to Cascade County, where the case was filed, the Montana Supreme Court said:

> "There can be no dispute that both federal law and courts, and this Court, are protective of broad venue rights for FELA plaintiffs. Pursuant to federal statute, a federal district court has jurisdiction of a FELA action, concurrent with the jurisdiction of state courts, if the defendant resides in or does business in that federal court's district or if the cause of action arose in that district. See 45 U.S.C. § 56. *Rule*, ¶ 16." (Emphasis supplied).

The authority of specific FELA jurisdiction found in 45 U.S.C. § 56 must be given great deference in this case involving a railroad worker and a railroad. Nothing in *Daimler* or *Goodyear* make any reference to FELA. The particular controls the general. § 1-2-102, M.C.A.

COMMERCE CLAUSE

Both parties submitted supplemental memorandums regarding the impact of the Commerce Clause of the U.S. Constitution (Art. I, § 8, Cl. 3) and the Due Process Clause of the 14th Amendment of the U.S. Constitution on this case. Monroy states that in 1912, the U.S. Supreme Court held that FELA was a constitutionally valid exercise of power to regulate railroad employees engaged in interstate commerce:

> "This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution.
>
> The duties of common carriers in respect to the safety of their employees, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power.
>
> * * *
>
> We conclude that rights arising under the act in question [FELA] may be enforced, as of right, in the courts of States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Second Employers' Liability Cases*, 221 U.S. 1, 47-49 (1912).

A century later, Justice Roberts sustained the constitutionality of the Affordable Care Act in the context of the Commerce Clause:

> 'The Constitution authorizes Congress to 'regulate Commerce with foreign Nations, and among the several States, and within the Indian Tribes' Art. I. § 8, Cl. 3. Our precedents read that to mean that Congress may regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those

> activities that substantially affect interstate commerce.'... The power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock and a loan shark's extortionate collections from a neighborhood butcher shop."
>
> *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2599 (2012).

Monroy argues that the FELA jurisdictional statute, 45 U.S.C. § 56, does not violate the Due Process Clause of the U.S. Constitution. Furthermore, the substantive due process rights of any railroad under FELA are not impaired by FELA.

BNSF says that Monroy misses the point of the Commerce Clause discussion. It is admitted by BNSF that Congress can regulate commerce between the States and Congress has the power to regulate railroads engaged in interstate commerce. But, according to BNSF, Congress did not, and could not, deprive BNSF of its constitutional rights by enacting FELA.

BNSF says nothing in *Daimler*'s personal jurisdiction analysis is inconsistent with FELA. But *Daimler* is not a specific due process challenge to FELA and does not implicate Congress' authority under the Commerce Clause relating to BNSF. What BNSF does argue is that FELA only refers to subject matter jurisdiction and does not address personal jurisdiction in state court. 45 U.S.C. § 56 has nothing to do with personal jurisdiction and is not contrary to *Daimler* according to BNSF.

BNSF also argues that Congress' authority under the Commerce Clause is limited by the Due Process Clause and that the Commerce Clause gives no power to Congress to modify or eliminate fundamental due process rights. Substantive due process rights relating to personal jurisdiction are not addressed by Monroy says BNSF.

The *Daimler* court framed the issue in that case in the second paragraph of the case:

> "The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over *Daimler* in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint."
>
> *Daimler*, 134 S.Ct. at 751.

First, the reliance of BNSF on its personal jurisdiction argument ignores the framing of the jurisdictional issues in both *Goodyear* and *Daimler*.

> "In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ___, 131 S.Ct. 2846, 180 L.Ed. 2d 796 (2011), we addressed the distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction. As to the former, we held that a court may assert jurisdiction over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum state.'"

Daimler, 134 S.Ct. at 751.

Likewise, the *Daimler* court turned to the discussion of general and specific jurisdiction:

> "With this background, we turn directly to the question whether Daimler's affiliations with California are sufficient to subject it to the general (all-purpose) personal jurisdiction of that State's courts. In the proceedings below, the parties agreed on, or failed to contest, certain points we now take as given. Plaintiffs have never attempted to fit this case into the specific jurisdiction category. Nor did plaintiffs challenge on appeal the District Court's holding that Daimler's own contacts with California were, by themselves, too sporadic to justify the exercise of general jurisdiction."
>
> *Daimler*, 134 S.Ct. at 758.

The analyses of all cited cases, and *Goodyear* and *Daimler* in particular, discuss jurisdiction and personal jurisdiction. But the key distinction was not substantive due process versus personal jurisdiction, it was general jurisdiction versus specific jurisdiction.

Second, BNSF's reliance on *Daimler* on page 5 of its Response to Plaintiff's Supplemental Memoranda is illuminating:

> "*Daimler* was, undoubtedly, an expression by the U.S. Supreme Court of a due process limitation prescribed by the Constitution. *Daimler*, 134 S.Ct. at 751 ("The question presented here is whether the Due Process Clause of the 14th Amendment precludes the district court from exercising jurisdiction over *Daimler* in

> this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint"). By contrast, none of the authority cited in Monroy's supplemental brief concerned individual liberty interests guaranteed by the Due Process Clause."

The *Daimler* case dealt with due process and jurisdiction of a case brought by Argentinian plaintiffs against a German corporation through its United States subsidiary corporation in a California federal court. That is a far different factual situation from this case which involves an Idaho employee of BNSF who was injured in Washington and brought suit in Montana pursuant to the specific federal jurisdiction of FELA against BNSF and not against a BNSF subsidiary.

Third, nothing in BNSF's due process argument changes any of the analysis above. Unless and until the Montana Supreme Court or the U.S. Supreme Court specifically deny jurisdiction in such a challenge to FELA jurisdiction and specifically overrule or limit 45 U.S.C. § 56, the vitality of said FELA jurisdictional statute will remain.

CONCLUSION

BNSF argues *Daimler* and *Goodyear* have significantly narrowed the scope of long-arm jurisdiction in all cases. According to BNSF, there is no specific jurisdiction by Monroy in this case because the injury occurred in Washington and there is no general jurisdiction in this case as BNSF is not at home in Montana. Recent U.S. Supreme Court case law trumps

not only Montana civil procedure and Montana case law, according to BNSF, but also trumps FELA law.

Monroy argues that *Goodyear* and *Daimler* do not preclude long-arm general jurisdiction in this case. Both *Goodyear* and *Daimler* involved overseas foreign subsidiaries, and the events that triggered the lawsuit occurred overseas. Here, the sole corporate party is BNSF. No subsidiary is involved. In *Goodyear* and *Diamler*, the injured parties tried to bootstrap jurisdiction with precarious or flimsy contacts by the subsidiary to the court in either North Carolina or California. Here, although Monroy's injury occurred in Washington, BNSF has a significant presence in Montana. In this case, Montana is a paradigm forum, and BNSF is at home in Montana.

Under Montana long-arm jurisdiction Rule 4(b)(1), BNSF is found within Montana for general jurisdiction purposes. A long line of Montana cases has consistently denied efforts by BNSF to challenge jurisdiction or venue.

But BNSF also asks this Court to ignore or overrule or distinguish over 100 years of state and federal FELA case law and specifically 45 U.S.C. § 56. *Goodyear* and *Daimler* ruled on general long-arm jurisdiction law. To have those two United States Supreme Court cases, that did not involve FELA, limit or control FELA jurisdiction based on the facts of those cases involving overseas foreign subsidiaries is a stretch that this Court is unwilling to make. BNSF has not carried its burden with its motion to dismiss for lack of personal jurisdiction. In light of the distinguishable facts of *Goodyear* and *Daimler* from the

facts in this case as well as the strong and specific FELA law and the broad FELA jurisdictional statute,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss is **DENIED**.

DATED this 30th day of July, 2014.

s/

HON. GREGORY R. TODD,
District Court Judge
DV 13-799

* * *

APPENDIX F

U.S. Constitution, Amendment 14, Section 1

No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Montana Rule of Civil Procedure 4. Persons Subject to Jurisdiction; Process; Service.

(a) Definition of Person. As used in this rule, the word "person," whether or not a citizen of this state, a resident of this state, or organized under the laws of this state, includes:

* * *

(3) a corporation;

* * *

(b) Jurisdiction of Persons.

(1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of Montana courts. Additionally, any person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, of any of the following acts:

(A) the transaction of any business within Montana;

(B) the commission of any act resulting in accrual within Montana of a tort action;

(C) the ownership, use, or possession of any property, or of any interest therein, situated within Montana;

(D) contracting to insure any person, property, or risk located within Montana at the time of contracting;

(E) entering into a contract for services to be rendered or for materials to be furnished in Montana by such person;

(F) acting as director, manager, trustee, or other officer of a corporation organized under the laws of, or having its principal place of business within, Montana; or

(G) acting as personal representative of any estate within Montana.

(2) Acquisition of Jurisdiction. Jurisdiction may be acquired by Montana courts over any person:

(A) through service of process as herein provided; or

(B) by the voluntary appearance in an action by any person either personally or through an attorney, authorized officer, agent, or employee.

* * *